INTERNATIONAL COURT OF JUSTICE

PLEADINGS, ORAL ARGUMENTS, DOCUMENTS

CASE CONCERNING PASSAGE THROUGH THE GREAT BELT

(FINLAND v. DENMARK)

COUR INTERNATIONALE DE JUSTICE

MÉMOIRES, PLAIDOIRIES ET DOCUMENTS

AFFAIRE DU PASSAGE PAR LE GRAND-BELT

(FINLANDE c. DANEMARK)

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The present volume contains the Application, request for the indication of provisional measures, written observations of Denmark on the request, oral arguments on the request, Memorial, Counter-Memorial and a selection of the correspondence in the case concerning *Passage through the Great Belt (Finland v. Denmark)*. This case, which was entered on the Court's General List on 17 May 1991 under Number 86, was the subject of an Order regarding the request for provisional measures (*Passage through the Great Belt (Finland v. Denmark), Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991*, p. 12) and was removed from the List by an Order of the Court of 10 September 1992, following discontinuance by the applicant Government (*Passage through the Great Belt (Finland v. Denmark), Order of 10 September 1992, I.C.J. Reports 1992*, p. 348).

*

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Le présent volume reproduit la requête, la demande en indication de mesures conservatoires, les observations écrites du Danemark et la procédure orale relatives à la demande, le mémoire, le contre-mémoire et un choix de la correspondance en l'affaire du *Passage par le Grand-Belt (Finlande c. Danemark)*. Cette affaire, inscrite au rôle général de la Cour sous le numéro 86 le 17 mai 1991, a fait l'objet d'une ordonnance afférente à la demande de mesures conservatoires (*Passage par le Grand-Belt (Finlande c. Danemark), mesures conservatoires, ordonnance du 29 juillet 1991, C.I.J. Recueil 1991*, p. 12) et a été rayée du rôle par ordonnance de la Cour du 10 septembre 1992 à la suite du désistement du gou-

vernement demandeur (*Passage par le Grand-Belt (Finlande c. Danemark), ordonnance du 10 septembre 1992, C.I.J. Recueil 1992*, p. 348).

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La Haye, 2000.

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APPLICATION INSTITUTING PROCEEDINGS SUBMITTED BY THE GOVERNMENT OF FINLAND

REQUÊTE INTRODUCTIVE D'INSTANCE PRÉSENTÉE PAR LE GOUVERNEMENT DE LA FINLANDE

To the Registrar of the International Court of Justice,

I have the honour to submit to the International Court of Justice, in accordance with Article 40 (1) of its Statute, read in conjunction with Articles 38 and 40 of its Rules of Court, an Application instituting proceedings by Finland against Denmark in the following case:

SUBJECT OF THE DISPUTE

1. On 10 June 1987 the Danish Folketinget (Parliament) passed Act No. 380 on the construction of a fixed traffic connection for both road and rail traffic across the strait of the Great Belt (Ann. 1). According to a Circular Note of the Ministry of Foreign Affairs of Denmark to all Heads of Mission accredited to Denmark of 30 June 1987 that traffic connection would either be a "high-level bridge" or "tunnel" (Ann. 2). In a further Circular Note of 24 October 1989 it was stated that the intention was to construct a "high-level bridge" with clearance for passage of "65 metres above mean sea level" (Ann. 3).

2. The planned suspension bridge over the main channel of the Great Belt has no opening. Thus, it will permanently close the Baltic for deep draught vessels of over 65 metres' height. As a Baltic State with a coastline only on the Baltic, Finland is seriously affected by such a project. It will prevent the passage of oil rigs and drill ships through the Great Belt between the Baltic and the North Sea. Such drill ships and oil rigs have been constructed in Finland since 1972. Most of them have navigated to their exploration or production fields through the Great Belt. If the projected construction works are carried out as planned that will mean an end to Finnish commercial activity in the field of the production of craft used for these purposes. The prospects for the Finnish shipbuilding industry are adversely affected. The eventuality of regular ships of over 65 metres' height is no longer a remote possibility. Some of the cruisers recently produced in Finnish shipyards already reach a height of close to 60 metres.

3. Finnish concerns had been drawn to the attention of the Danish authorities even before information was made public that Denmark had given up its tunnel alternative. These concerns were made explicit in a letter from the Finnish Embassy in Copenhagen to the Danish Board of Navigation (Sjöfartsstyrelsen) of 18 July 1989 (Ann. 4). In a reply from the Danish Ministry of Foreign Affairs, dated 29 August 1989, it was affirmed that rigs and drill ships which might extend to 150 metres' height could not pass through the Great Belt once the planned bridge had been completed (Ann. 5). The contacts between Finnish and Danish authorities culminated in an exchange of letters in February 1991 between the Prime Minister of Finland, Mr. Harri Holkeri, of 6 February 1991 and the Prime Minister of Denmark, Mr. Poul Schlüter, of 20 February 1991 (Anns. 6-7).

4. On the Finnish side, it has been maintained that international law guarantees the right of free passage of ships, including oil rigs and drill ships, through the Great Belt and that there is no justification in international law for the unilateral limitation of that right by Denmark. It has, therefore, been observed that while Denmark clearly enjoys the sovereign right to construct a fixed traffic connection so as to link two of its islands together, this must be done in such a fashion as to safeguard the continued right of free passage.

5. Finland believes that there are several technically feasible solutions for the construction of a fixed traffic connection over the Great Belt which would meet the needs of Denmark while taking account of Finland's rights and interests.

6. On the Danish side, it has likewise been affirmed that all ships enjoy the right of free passage through the Great Belt. But it has also been maintained that the right does not cover the kinds of craft used for oil exploration produced in Finland and that it covers only "existing ships" and not ships that might be produced or navigate in the Baltic in the future (cf. Anns. 7 and 3).

7. Frequent contacts between Finnish and Danish authorities during 1989 and 1990 led to no change in these positions. The countries' views continue to differ both on their legal rights as well as on the technical and economic feasibility of taking account of the Finnish interests. The discussions ended in the Danish Prime Minister's letter of 20 February 1991 (Ann. 7) in which he noted that "there can be no question of modifying, let alone considering another alternative to the project at this advanced stage". Consequently, the project continues as planned with no regard for the Finnish points of view and with Denmark having declined even to consider any modifications in the project.

8. In these circumstances, faced with the imminent prospect of a *fait accompli*, Finland has seen no other choice than to submit the dispute to the International Court of Justice.

JURISDICTION

9. According to the declaration of acceptance of the jurisdiction of the International Court of Justice, made by Denmark on 10 December 1956:

> "Pursuant to Article 36, paragraph 2, of the Statute of the International Court of Justice, the Kingdom of Denmark recognizes as compulsory *ipso facto* and without special agreement the jurisdiction of the Court in relation to any other State accepting the same obligation, that is to say on condition of reciprocity . . ."

A declaration with identical content was made by Finland on 25 June 1958. By virtue of these declarations, the jurisdiction of the International Court of Justice has been established.

10. It might be noted that a basis of jurisdiction is also provided by the Optional Protocol of Signature concerning the Compulsory Settlement of Disputes (450 *UNTS* 169), done at Geneva on 29 April 1958 which entered into force on 30 September 1962. The Protocol was signed definitively by Finland on 27 October 1957 and ratified by Denmark on 26 September 1968. Article I of the Protocol provides that:

> "Disputes arising out of the interpretation or application of any Convention on the Law of the Sea shall lie within the compulsory jurisdiction of the International Court of Justice, and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to this Protocol."

STATEMENT OF FACTS

11. *Geographical description.* The Great Belt (Store Baelt) is one of the three Danish straits — the Little Belt, the Great Belt and the Sound (or Öresund) — that constitute the only natural opening between the Baltic and the North Sea.

Unlike most other Baltic Sea States, Finland has a coastline only in the Baltic Sea. For Finland, therefore, the Danish straits constitute the sole maritime link connecting it with locations outside the Baltic. Finnish commerce and industry are, in this sense, particularly dependent on the conditions of passage in and through the Danish straits (cf. the enclosed map, Ann. 8).

12. The Great Belt is situated between the Danish islands of Fyn-Langeland in the west and Sjaeland-Lolland in the east. Its total length is about 60 kilometres. It is delimited in the north by a line from Fyns Hoved to Rosnaes and in the south by a line from Gustav Flak to Kappeln.

13. The width of the Great Belt varies between 18.5 and 28.2 km. It is divided by Sprogoe island into two channels, the West Channel (Vesterrenden) between Nyborg (Fyn) and Sprogoe, and the East Channel (Oesterrenden) between Sprogoe and Halsskov (Sjaeland). The navigable route in the West Channel is about 3.3 km and in the East Channel about 1.7 km wide. At their narrowest, both channels traverse through Denmark's territorial sea (cf. Ann. 9).

14. *Conditions of passage in the Great Belt.* The Great Belt is the widest and deepest of the three straits and therefore also the one used in particular by deep draught vessels. With the object of ensuring the safety of navigation of large ships passing through the Danish waters, and of reducing the risk of oil pollution resulting from the grounding and collision of tankers, the Danish Government has established a transit route — the "Route T" — through the Great Belt (cf. Ann. 10). Route T is the primary route through the Great Belt. With a minimum depth of 17 metres (55.8 ft) it is designated as a deep water route. This is a great advantage as the depth of the Sound — the main alternative passage-way — is less than 8 metres. Because the draught of some of the ships, including oil exploration and production rigs and drill ships, is up to 15 metres, the Great Belt has been the only passage-way they can use when communicating to and from the Baltic. The importance of the Great Belt is enhanced by the on-going Danish-Swedish project to close also the Sound by building a bridge across it.

15. *Traffic in the Great Belt.* There is generally very heavy traffic through the Great Belt. During the past few years approximately 20,000 ships of over 50 GRT have passed through the Great Belt. In 1987 the relevant figures were: 10,271 ships passing northwards; 10,938 ships passing southwards. Route T directs traffic into the East Channel at Sprogoe island. At this place, there is also an IMO adopted traffic separation scheme (cf. Ann. 10).

16. The East Bridge will permanently prevent passage by deep draught vessels with a height of over 65 metres between the Baltic and the North Sea. If the projected bridge over the Sound is completed as planned, then 65 metres will be the maximum height for all vessels navigating to and from the Baltic. Among these are most drill ships and oil rigs. Since 1972, the Finnish company Rauma-Repola Offshore Oy has manufactured 23 oil exploration rigs and drill ships plus legs and jacking units for two jack-up rigs (which later on have been assembled by Rauma-Repola as well) and other equipment and structures for use in offshore industries. All of these craft have been delivered in Finland for use outside the Baltic and some of them have occasionally returned to the Baltic for modification or maintenance. The deep water channel of the Great Belt has been the only available passage-way for many of them — the Sound being too shallow. The company continues to compete on the international offshore market by offering new offshore craft the draught of which allows navigation only through the Great Belt. The company expects to be building 10-20 new offshore craft in the 1990s.

17. *Technical details of the passage of oil rigs and drill ships.* Rauma-Repola Offshore Oy produces three types of offshore craft with dimensions exceeding

those of the projected East Channel bridge. Its *drill ships* are regular ships with drilling tower and equipment. Delivered drill ships have had a height of 80.3 metres and a transit draught of 7.3 metres. Its *semi-submersible* rigs are exploration craft with two pontoons each carrying two to four columns that support the main deck. The drill towers have reached a height of 80 to 112 metres. The semi-submersible moves under its own propulsion and has a transit draught of up to 15 metres. The third type is the *jack-up* rig. Delivered jack-ups have reached a height of close to 150 metres. The company has made recent offers for jack-ups reaching 170 metres. Jack-ups are transported by heavyload transport vessels with a transit draught of up to 10 metres and more.

18. The drill ships and oil exploration rigs manufactured by Rauma-Repola Offshore Oy are fully constructed already at the shipyard. Their navigating height thus varies between 80 metres (drill ships) and 150 metres (rigs). The competitiveness of these installations is based on the fact that all construction work can be undertaken in the shipyard which is specially equipped for that purpose. It has been estimated that completing the construction only after the craft has passed the Great Belt, in the North Sea, will involve both an additional cost of approximately 30-55 million Finnmarks (US$7.5-13.75 million) plus an extension of the time of delivery of up to four months. This will inevitably destroy their competitiveness on the international market.

19. *Projection of future ships of more than 65 metres' height.* During the past 20 years, Finland has established itself as one of the major shipbuilding nations in Western Europe. Specializing early, the Finnish shipyards are now building a relatively high number of large special vessels with a length of over 200 metres and a volume of over 70,000 GRT. Despite the international shipbuilding crisis, the building of larger passenger vessels and cruisers seems to be continuing as before. The largest cruisers delivered from Finnish shipyards during 1990 and 1991 have had a length of 260 metres and a height of 56.3 metres.

20. The largest existing passenger ships have already reached a height of 65 metres. (Even the official commentary to the Danish governmental proposition for the law of 1987 suggests that only a height of 76-77 metres will allow necessary passage.) The trend in the shipbuilding industry generally is towards larger cruisers and other vessels. This can be seen also in the attached chart indicating the increase of the height and draught of vessels recently constructed in Finland (Ann. 11). If the bridge is completed as planned, Finnish shipyards will no longer enjoy the same opportunities to participate in the development of larger ship units as our rival nations around the North Sea or the Mediterranean.

21. *Description of the Danish projects. (a)* The first projects for a fixed connection over the Great Belt date back to the 1930s. A Governmental Commission was set up in 1948 to study the possibilities of a fixed connection over the strait. The final report of the Commission was published in December 1959 (Report 237/1960) and suggested the construction of a bridge for both road and rail traffic over the Great Belt. During the 1960s and 1970s further studies on the matter were carried out. In 1972 a suggestion for a tunnel for car trains in the East Channel was made by a Governmental Working Group. In 1973 a law (414/13 June 1973) was passed concerning the Great Belt bridge. In 1978, however, the Danish State company created for the project was wound up and the project was suspended *sine die*.

(b) On 12 June 1986 a political agreement was reached in Denmark on the establishment of a fixed connection over the Great Belt. This agreement became the basis for the current law of 1987. The law provides for a rail and road traffic link. The rail connection would be established as a low bridge of 6.6 km over the West Channel and two 8 km tunnels under the East Channel.

The road traffic connection would also cross the Western Channel on the low bridge. For the East Channel, provision was made for two alternatives: either a high bridge or a tunnel. In 1989 (cf. para. 1 *supra*) foreign embassies in Copenhagen were informed that though rail traffic would cross the East Channel in drilled tunnels, the road traffic connection over the East Channel was to be established in the form of an elevated bridge 6.7 km long. No reason was given for this choice.

(c) The present project is to be carried out in several stages. The railway link (i.e. low-level bridge over the West Channel, tunnel under the East Channel) was planned for completion in 1993. Some delays have, however, occurred. The motorway link is expected to be completed in 1996. Presently, it is expected that the contracts for the East Channel suspension bridge should be signed in May-June 1991. (For details, see Ann. 12.) The total construction budget of the project is now estimated at approximately 22 billion DKK (US$3.35 billion).

22. *The economic interest of passage to Finland.* For Finland, the right of passage in the Danish straits is of the utmost importance because of Finland's geographical location, as outlined in paragraph 11 *supra*, and because of the importance of shipbuilding to Finnish metal industries and export in general. The right of passage is essential for the continued participation of Finnish shipbuilding industry in the construction of large ships for the international market as well as for the continued possibility for navigation by large ships more generally to and from Finnish ports.

23. In addition to its long-term interest, Finland also has an immediate economic interest relating to the continued possibility of Rauma-Repola Offshore Oy to manufacture and deliver drill ships and oil exploration and production rigs. As pointed out above, Rauma-Repola Offshore Oy has delivered a large number of drill ships and oil exploration rigs for use outside the Baltic. Currently, two jack-ups are being constructed in co-operation with a corporation from the Soviet Union. The value of one such craft is approximately 400 million Finnmarks (US$100 million). Their annual value to Finnish exports has been from 400 million to over one billion Finnmarks (US$100-over 250 million). It has been estimated that the global offshore oil exploration market will be needing from 200 to 400 new exploration rigs or drill ships in the 1990s. Assuming a market share similar to that in the 1970s and 1980s, Rauma-Repola Offshore Oy can be assumed to have a demand for 10-20 drill ships and rigs in the 1990s.

THE LAW

24. *The Great Belt is a strait used for international navigation.* The breadth of the Danish territorial sea in the Great Belt is 3 miles. At their narrowest, both the East and West Channels traverse fully through Denmark's territorial sea (cf. Ann. 9). It is, then, impossible to pass through the Great Belt without passing through Denmark's territorial sea. Nevertheless, it is clear that the Danish straits are "straits used for international navigation between two parts of the high seas" as defined by the International Court of Justice in the *Corfu Channel* case. This is also the Danish position, as reflected, for example, in Ordinance No. 437 (1985) governing the Delimitation of the Territorial Sea (para. 3, see Ann. 13).

25. *The régime of free passage through the Great Belt* can be claimed to be governed by two instruments, the 1857 Treaty of Copenhagen on the Abolition of the Sound Dues and the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone. Account will also have to be taken of customary law relating to free passage through international straits and, so far as applicable, of the

transit passage régime of the 1982 United Nations Convention on the Law of the Sea.

26. While it may be the case that each of these sources of applicable law differs in some respect from the others (some being more liberal in their construction of the extent of passage rights than others), their general content is roughly the same as far as the present situation is concerned. Each provides for free passage in the Great Belt. Indeed, this has not been contested by the Danish Government itself. To the contrary, in its notes of 1987 and 1989 (cf. Anns. 2-3) and in its correspondence with the Finnish Government, it has consistently maintained the position that free passage through the Great Belt exists and will continue to exist even after the construction of the East Channel bridge.

27. *Free passage through the Great Belt extends to drill ships, oil rigs and future ships.* Finland understands the Danish position to be that though passage through the Great Belt is governed by the right of free passage, it does not extend to the kinds of craft produced in Finland.

28. This position cannot be sustained. It is obvious that the right of free passage applies to drill ships and ships carrying jack-ups on deck, in all respects conforming to ships in transit. The right of free passage must be equally applicable to semi-submersible rigs that have their own means of propulsion and are towed only to speed up their passage. They enter the Great Belt for the purpose of regular maritime transit. In a number of international conventions they are considered as ships. Many national shipping registries, including those of Denmark and Finland, include drilling rigs. Indeed, if regular navigation rules were not applied to them, it is hard to see how they could move at sea at all.

29. The right of free passage must apply also to *reasonably foreseeable* cruisers, ferries etc. of over 65 metres. Cruisers and ferries used in or delivered from Finnish shipyards today already exceed 56 metres in height. Elsewhere, the largest ships have already reached 65 metres' height. During the past 20 years, there has been a constant tendency towards building larger ships. Though it is clear that the right of free passage should not be assumed to extend to any imaginable vessels, it is equally clear that to limit it to presently existing ships is an arbitrary restriction. The relevant criterion which takes account both of the interests of shipbuilding nations and those of strait States can only be that of reasonable foreseeability.

THE FINNISH CLAIM

30. Finland contends that there is no foundation in international law for the unilateral exclusion by Denmark of passage between the Baltic and the North Sea by vessels such as drill ships and oil rigs or other existing or reasonably foreseeable ships with a height of 65 metres or above to and from Finnish shipyards and ports. Such exclusion, through the completion of the fixed Great Belt traffic connection in its presently planned form, violates Finland's rights in respect of free passage through the Great Belt as established in the relevant conventions and customary international law. The right of free passage belongs to all States but more particularly to Finland for whom it constitutes the only legal guarantee for continued maritime communication between its shores and the world oceans.

31. Finland is in no way asserting that international law prohibits Denmark from exercising the right to construct a fixed traffic connection over the Great Belt to connect two parts of its land territory. Denmark is fully entitled, as the territorial sovereign, to take measures to improve its internal and international

traffic connections. But Denmark's entitlement to take such measures is necessarily limited by the established rights and interests of all States, and of Finland in particular, in the maintenance of the legal régime of free passage through the Danish straits. By refusing to enter into negotiations with Finland on the possibilities of finding a solution that would accommodate and satisfy the legally protected rights and interests of both States, and by insisting that the planned bridge project will be completed without modification, Denmark has chosen a way of unilateral action and ignored the legally protected rights of other States, and of Finland in particular.

32. The Charter of the United Nations, customary international law and several bilateral and multilateral treaties binding on Denmark and Finland oblige these countries to negotiate in good faith and in a spirit of co-operation for the peaceful settlement of their disputes. Finland has been, and continues to be, ready to start meaningful negotiations with Denmark on how to reconcile the conflicting sets of interests without derogating from either State's rights as established by international law. This could be done by taking account of all available technologies relating to tunnel and bridge construction; possible economic measures to offset whatever modifications either party would have to make to its current activities or future plans as well as joint legal arrangements for the safeguarding of both countries' rights in the future.

THE SUBMISSIONS

33. Accordingly, the Government of Finland asks the Court to adjudge and declare:

(*a*) that there is a right of free passage through the Great Belt which applies to all ships entering and leaving Finnish ports and shipyards;
(*b*) that this right extends to drill ships, oil rigs and reasonably foreseeable ships;
(*c*) that the construction of a fixed bridge over the Great Belt as currently planned by Denmark would be incompatible with the right of passage mentioned in subparagraphs (*a*) and (*b*) above;
(*d*) that Denmark and Finland should start negotiations, in good faith, on how the right of free passage, as set out in subparagraphs (*a*) to (*c*) above, shall be guaranteed.

Finland reserves its right to modify or to add to the above submissions and in particular its right to claim compensation for any damage or loss arising from the bridge project. A request for provisional measures in accordance with Article 41 of the Statute will be filed by Finland with the Court shortly.

Helsinki, 17 May 1991.

(*Signed*) Tom GRONBERG,
Agent of the Government of Finland.

The Embassy of Finland to the Netherlands,
Groot Hertoginnelaan 16,
2517 KH Den Haag.

Tel.: (070) 346 97 54;
Fax: (070) 310 71 74.

LIST OF ANNEXES

To the Registrar of the International Court of Justice.

I have the honour to submit, in connection with the Application of Finland, dated today and instituting proceedings against Denmark in a case concerning the right of passage in the Great Belt, the following Annexes:

1. Unofficial translation of Danish Law No. 380, 10 June 1987 (extracts);
2. Text of Danish Circular Note of 30 June 1987;
3. Text of Danish Circular Note of 24 October 1989;
4. Unofficial translation of a letter of 18 July 1989 from the Finnish Embassy in Copenhagen to the Danish Board of Navigation (Sjöfartsstyrelsen);
5. Unofficial translation of a letter from the Danish Ministry of Foreign Affairs to the Finnish Embassy in Copenhagen of 29 August 1989;
6. Unofficial translation of a letter from the Prime Minister of Finland, Mr. Harri Holkeri, of 6 February 1991 to the Prime Minister of Denmark, Mr. Poul Schlüter;
7. Unofficial translation of a letter from the Prime Minister of Denmark, Mr. Poul Schlüter, of 20 February 1991 to the Prime Minister of Finland, Mr. Harri Holkeri;
8. A general map of the Baltic Sea and the Danish Straits;
9. A map of the territorial waters of Denmark;
10. Map showing the "Route T" and the IMO adopted traffic separation scheme through and in the Great Belt;
11. A chart indicating the height of passenger ships recently constructed in Finland;
12. A brochure of the Great Belt project ("Storebælt");
13. Translation of text of Ordinance No. 437 (1985) governing the Delimitation of the Territorial Sea (extract).

The copies of the original-language versions of the unofficial translations (Annexes 1, 4, 5, 6, 7) have been deposited under a separate cover with the Registrar of the Court.

Helsinki, 17 May 1991.

(Signed) Tom GRÖNBERG,
Agent of the Government of Finland.

Annex 1

DANISH LAW NO. 380 OF 10 JUNE 1987

(Unofficial translation)

[Extract from the]

ACT ON THE FIXED LINK ACROSS THE GREAT BELT

We, Margarethe the Second, by the Grace of God Queen of Denmark, by these presents make known:

The Folketinget has adopted, and We by Our consent have caused the following to be enacted:

Installation

1. The Minister for Public Works shall under this Act be authorized to make provisions to ensure the installation of a fixed link for rail and road traffic across the Great Belt.

2.1. The installation shall be implemented in two stages of which the first shall be the rail link and the second the motorway link.

2.2. The installation for the second stage shall begin no later than one year before the expected opening of the rail link, but the speed of implementation shall in other respects be determined according to economic and entrepreneurial criteria, i.a. by the establishment of a rational step-by-step plan for the project as a whole.

3.1. The rail link shall be installed with two tracks in a tunnel under the East Channel and over the low bridge of the West Channel.

3.2. As a link in the first installation stage, the low bridge shall to the extent economically justifiable be constructed for motorway traffic in addition to railway traffic.

4.1. The motorway link shall consist of four traffic lanes and one service lane.

4.2. The motorway link shall cross East Channel by a high bridge with a clearance sufficient for navigation, or by a sunken tunnel. A Project for tendering bids on a sunken tunnel shall also be prepared for the event that it technically and economically is deemed appropriate to tender for both alternatives.

4.3. The motorway link shall cross the West Channel by the same low bridge as the rail link, since the low bridge will be completed as a link in the second stage of installation.

5. Out of consideration for the marine environment of the Baltic Sea, the two stages of the installation shall be implemented separately, so as to ensure that the flow of water through the Great Belt remains unaltered after the completion of the Fixed Link.

6.1. The Minister for Public Works shall be empowered to have built requisite connecting installations for i.a. the motorway and railway, and in this context to undertake the removal of the Korsoer and Nyborg railway stations.

6.2. The Minister for Public Works shall determine which parts of the total installations shall be deemed to be principally part of the State railway installations and which shall be deemed to be principally part of the main roads network.

7. The Minister for Public Works shall be empowered to suspend DSB (Danish State Railway) ferry traffic between Korsoer and Nyborg once the railway link is operative, and DSB ferry traffic between Halsskov and Knudshoved, once the motorway link is operative.

. . . .

[Paragraphs 8-19 of the Act constitute a separate chapter under the heading *Ownership and Administration*.]

. . . .

Other Provisions

20.1. The Minister for Public Works shall be empowered to acquire such real property for the company and the State through expropriation, as may be necessary for the implementation of the installation referred to in this Act. Expropriation shall take place in accordance with the provisions on the procedure relative to expropriation of real property.

20.2. The Minister for Public Works shall determine the direction of the installation in respect of sea territory.

21. The following Acts are hereby repealed:

(1) Act No. 414 of 13 June 1973 on the construction of a bridge across the Great Belt.

(2) Act. No. 296 of 6 June 1984 on the extension of the ferry traffic across the Great Belt.

Christiansborg, 10 June 1987.

By Our Royal Hand and Seal

Margarethe R. Frode Noer Christensen.

Annex 2

DANISH CIRCULAR NOTE OF 30 JUNE 1987

MINISTRY OF FOREIGN AFFAIRS

R.H. File No. 55.D.33.

The Ministry of Foreign Affairs has the honour to inform that on 26 May 1987 the Danish Folketing (Parliament) passed a new Act No. 380 of 10 June 1987 on the construction of a fixed traffic connection for both vehicular and rail traffic across the Great Belt, i.e. between Halsskov on Zealand and Knudshoved on Funen.

The new Act repeals the former Act No. 414 of 13 June 1983 on the construction of a bridge across the Great Belt, of which all Heads of Mission accredited to Denmark were informed by Circular Note of 12 May 1977.

According to the new Act, the construction works will be carried out in two stages. The first stage consists of a railway connection with two sets of railway tracks, which will cross the Great Belt through a tunnel under the Eastern Channel (Østerrenden), and of a low-level bridge across the Western Channel (Vesterrenden).

The second stage comprises a four-lane motorway with emergency lanes. The motorway will cross the Western Channel on the same low-level bridge as the railway connection. It has not yet been decided whether the motorway shall cross the Eastern Channel on a high-level bridge or through a tunnel. In case the bridge solution is selected, the erection of the bridge section crossing the Eastern Channel will, in conformity with international law, allow for the maintenance of free passage for international shipping between the Kattegat and the Baltic Sea as in the past.

The first stage, i.e. the railway connection, which has already started, is expected to be completed at the end of 1992. The construction of the motorway connection shall be initiated not later than one year before the railway is taken into use. The motorway will probably be completed at the end of 1995.

Copenhagen, 30 June 1987.

To all Heads of Mission accredited to Denmark.

Annex 3

DANISH CIRCULAR NOTE OF 24 OCTOBER 1989

MINISTRY OF FOREIGN AFFAIRS

Referring to Circular Note of 30 June 1987 by which all Heads of Mission accredited to Denmark were informed of the adoption of Act No. 380 of 10 June 1987 on the Construction of a Fixed Traffic Connection across the Great Belt the Ministry of Foreign Affairs has the honour to convey the following supplementary information on the status of the Great Belt link and in particular on the high-level bridge across the Eastern Channel of the Great Belt, i.e. between Zealand and the island of Sprogø:

The first stage of the construction works comprises the railway connection. The railway tracks will cross the Western Channel (i.e. between the islands of Funen and Sprogø) on a low-level bridge with a vertical clearance (i.e. the free sailing height or air-draught) for passage of 18 metres above mean sea level in the navigation spans at the centre of the bridge. Across the Eastern Channel the railway connection will consist of a tunnel to be drilled through the subsoil of the Great Belt. The railway connection is expected to be completed during 1993.

As regards the second stage of the Great Belt link, which consists of a motorway connection, it has been decided to construct a high-level bridge across the Eastern Channel. In the navigation span at the centre of the bridge the vertical clearance for passage under this high-level bridge will be 65 metres above mean sea level. The horizontal clearance will be a total of not less than 750 metres or at least 375 metres for each traffic separation lane for northbound and southbound sailing, respectively. The motorway will cross the Western Channel on the same low-level bridge as the railway tracks.

During the period of construction which has been initiated in autumn 1989 as regards construction of the low-level bridge across the Western Channel and will be terminated at the end of 1995 as far as the high-level bridge across the Eastern Channel is concerned, the free and safe passage of ships through the Great Belt will be ensured. Details on the implications of the construction works for navigation in the Great Belt will be given in due course through the appropriate maritime channels of communication.

Thus the construction of the traffic connection across the Great Belt will, in conformity with international law, allow for the maintenance of free passage as in the past for all existing ships navigating this strait between the Kattegat and the Baltic Sea.

Copenhagen, 24 October 1989.

To all Heads of Mission accredited to Denmark.

Annex 4

LETTER OF 18 JULY 1989 FROM THE FINNISH EMBASSY IN COPENHAGEN TO THE DANISH BOARD OF NAVIGATION (SJØFARTSSTYRELSEN)

(Unofficial translation)

The Embassy of Finland,
Commercial Department,
Esplanaden 46,
DK-1263 Copenhagen K.

K-307

Board of Navigation
Ib Winkel Smith

18 July 1989.

LINK OVER THE GREAT BELT AND LARGE TRANSPORTS
THROUGH THE DANISH STRAITS

Representatives of the Finnish industry who have followed the planning of a fixed bridge over the Great Belt have turned to us inquiring how big transports by sea through the Danish Straits can be carried out in the future in case the bridge will have the dimensions planned.

The minimum clearance that enables large transports of e.g. drilling platforms is as follows:

— depth 15 m
— free height 150 m
— free passage width 200 m.

According to our knowledge, transports of the above-mentioned size will be obstructed by the new bridge. If this is the case we would like to receive information on eventual other feasible routes.

We are looking forward to your reply to the above issues.

With best regards.

(Signed) Clas-Erik JUTHAS,
Commercial Secretary.

Annex 5

LETTER FROM THE DANISH MINISTRY OF FOREIGN AFFAIRS TO THE FINNISH EMBASSY IN COPENHAGEN OF 29 AUGUST 1989

(Unofficial translation)

Commercial Secretary,
Clas-Erik Juthas,
Embassy of Finland,
Esplanaden 46,
1263 Copenhagen.

29 August 1989.

With reference to your letter of 18 August *[sic]* 1989 addressed to the Danish Board of Navigation concerning the bridge over the Great Belt I can following agreement with the Board and the A/S Storebæltsforbindelsen inform you that the clearance of the planned bridge is not going to permit the passage of structures measuring 150 metres in height. Such structures could, however, use the alternative route of Oeresund insofar as their depth does not exceed 8 metres under sea-level. According to Storebæltsforbindelsen 8 metres is the normal depth of e.g. drilling-platforms being towed.

According to A/S Storebæltsforbindelsen drilling-platforms, jacks and other high structures on them, can usually be partly dismantled (lowered) for transportation, which is often done for safety reasons on the open sea, and this would, furthermore, permit the free passage of the construction under the Great Belt bridge.

Yours truly,

(Signed) Povl THESTRUP.

Annex 6

LETTER FROM THE PRIME MINISTER OF FINLAND, MR. HARRI HOLKERI, OF 6 FEBRUARY 1991 TO THE PRIME MINISTER OF DENMARK, MR. POUL SCHLUTER

(Unofficial translation)

Helsinki, 6 February 1991.

Dear Poul,

I am turning to you in an urgent matter. As you probably know, Finnish and Danish authorities have in various contexts discussed the issue of building a fixed traffic connection over the Great Belt. What is problematic in the context is that the bridge would close the traffic for oil drilling units built in Finland for export. Since the early 1970s more than ten such units, including several oil-detecting craft have used the Great Belt as the only possible passage from the Baltic Sea to world oceans.

No progress has been made in the discussions. The Danish authorities have not wanted to discuss any alternative solution, but have insisted on the strictly legalistic argument that oil drilling units are not ships and therefore do not have the right to free passage. Consequently Denmark does not find that it in any way need consider Finnish interests in this matter. Our viewpoint is that international law guarantees free and unhampered passage to all such rigs and vessels.

The Danish authorities have, furthermore, suggested that it is technically impossible to accommodate the Finnish claims.

This is difficult for us to accept in the absence of any technical or economic data whatever on potential alternatives to the current plans.

Parallel with our discussions the bridge project is coming closer to a point where it is too late to influence the plans.

It is very much in Finland's economic and industrial interest to secure the continued operation of one of its major sectors in the shipyard industry. We cannot accept that its competitiveness be radically reduced through a restriction of the right to innocent passage through the Great Belt. We are of the opinion that there must be other solutions which would take into account our interests while satisfying the legitimate requirements of road and rail traffic.

For the Finnish Government it would be important to know as soon as possible whether there is any real possibility of satisfying the Finnish claims in accordance with the technical data at the disposal of the Danish authorities. This would presuppose that the negotiations be given sufficient mandate and the bridge project postponed for the duration of the negotiations. Thus a situation could be avoided where the question could only be settled by recourse to international jurisdiction.

I hope we can find a solution compatible with the tradition of excellent relations between our countries.

Yours sincerely,

(Signed) Harri HOLKERI.

Annex 7

LETTER FROM THE PRIME MINISTER OF DENMARK, MR. POUL SCHLUTER, OF 20 FEBRUARY 1991 TO THE PRIME MINISTER OF FINLAND, MR. HARRI HOLKERI

(Unofficial translation)

Copenhagen, 20 February 1991.

Dear Harri,

I have received your letter explaining the Finnish viewpoint on the right to innocent passage through the Great Belt in relation to building a fixed link over it.

It is obviously true that assembled Finnish oil rigs will not be able to pass under the East Bridge with clearance in the accepted project being 65 metres.

Preparing the project has included thorough studies of international law as well as factual and technical aspects. We in Denmark have, for the very reason of fulfilling our obligations under international law, made great efforts not to disrupt passage of ships and to change traffic conditions as little as possible. Consequently, we have opted for a rather expensive solution, purely out of consideration for navigation.

I do not consider, however, that our obligations under international law extend further than ships, and this has been the firm basis of our negotiations both in relation to earlier projects and the current one.

You describe the matter as urgent for Finland, but nevertheless confirm that the mode of transport in question has been taking place since the early 70s. Denmark has endeavoured to keep the international community up to date on its plans, and as you know, we informed all heads of mission accredited to Copenhagen already in 1977 of the then current project (clearance 62 metres). To my knowledge Finland did not react at that time, but it was nevertheless found that the planned clearance was not sufficient for the biggest ships. This problem has been remedied in the current project.

The subsequent notification, in 1987, which introduced the tunnel alternative, met with no response. It was only in the summer of 1989, when the current project had been decided upon, that Finland expressed any grievance over the matter.

Your wish that work on the bridge be suspended at this advanced stage of the project seems to me quite an unreasonable demand on Denmark.

I am quite convinced that Denmark is not overstepping any obligation under international law by building the bridge. This conviction has, as already mentioned, been the basis of the current as well as previous projects.

We have nevertheless seriously considered other aspects as well. The longstanding friendly relations between our countries, which we both value inestimably, has caused us to undertake extensive last-minute investigations to see if a technical solution could not be found to satisfy both parties, although we did not consider ourselves under any legal obligation to do so.

That this was to no avail I am the first to regret, but the conclusion on our part is that there can be no question of modifying, let alone considering another alternative to the project at this advanced stage.

It goes without saying that Denmark does not want to obstruct Finnish industry. On the other hand it is hardly reasonable that Denmark should be prevented from realizing a major national project for the sake of rather limited transports of which there according to your own words have been just over ten in two decades. During the negotiations the Finns have consistently refuted the possibility of a final assembly of the oil rigs only after their passage through the Great Belt and insisted that this would reduce their competitiveness, a fact which you even mention in your letter.

We have not, however, received any documentation to that effect, and in fact, experts in Denmark are of the opinion that final assembly of the ultimate sections of the legs only after passage through the Great Belt would not entail such additional costs as to seriously reduce competitiveness. I am sorry to say that we are of the impression that Finland expects Denmark to unilaterally present technical solutions and modifications.

Against this background I trust you will understand that I cannot accept as reasonable that Denmark forfeit the vital national interests connected with the implementation of the Great Belt project. We are of the view that we have fulfilled our legal obligations and have done our best to be as accommodating as possible.

Yours sincerely,

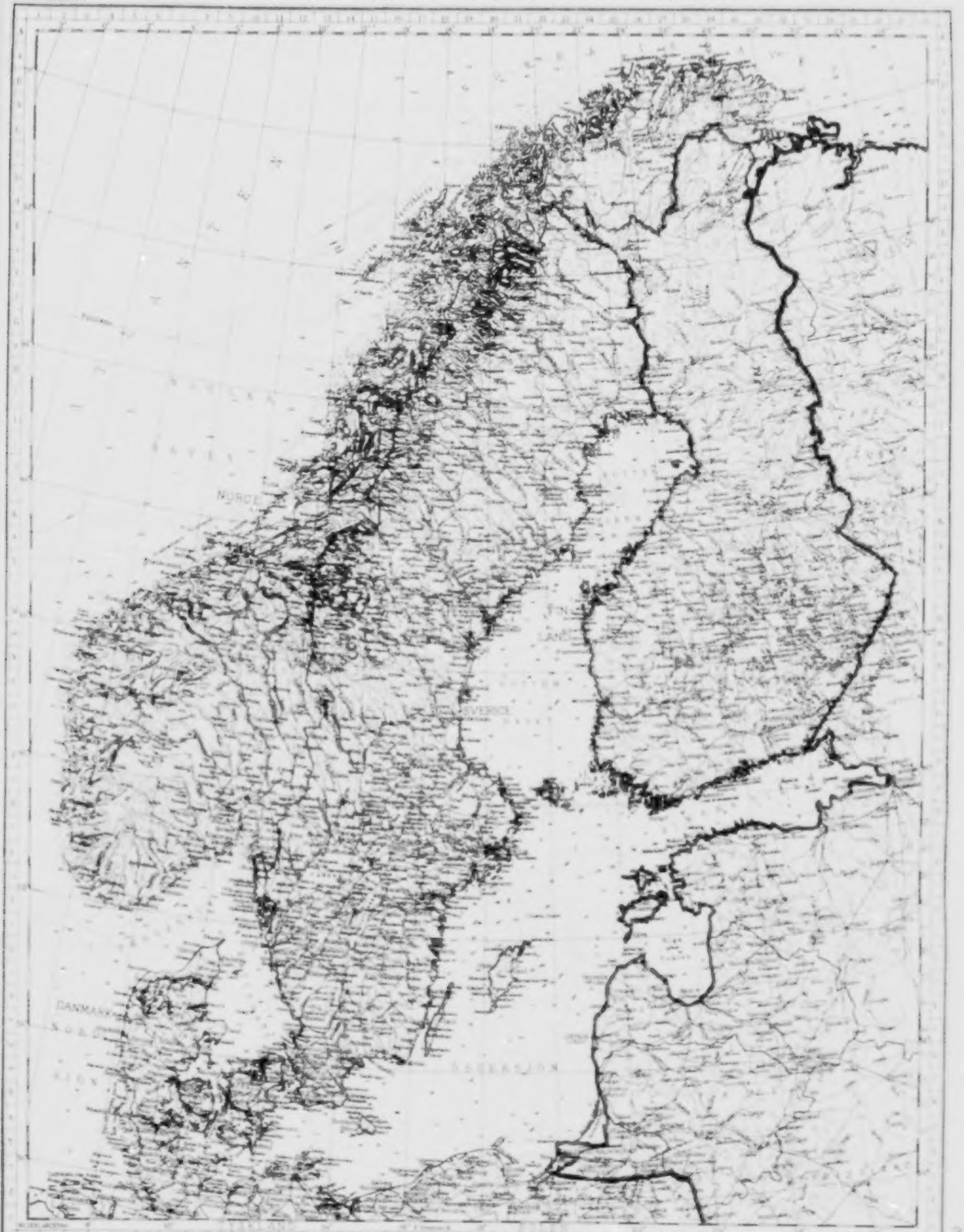
(Signed) Poul SCHLÜTER.

Annex 8

GENERAL MAP OF THE BALTIC SEA AND THE DANISH STRAITS

[See facing page]

Source: Bonniers Stora Världatlas, Albert Bonniers Förlag, Stockholm, 1951.



SVERIGE, NORGE, DANMARK, FINLAND OCH BALTICUM

NORGE
SVERIGE
FINLAND
DANMARK
ÖSTERSJÖN

Annex 9

MAP OF THE TERRITORIAL WATERS OF DENMARK

[See facing page]

Source: Seachart "Danmark med omgivende farvande", scale 1 : 850 000, Identification Code F, published by Kort- Og Matrikelstyrelsen, Denmark.

Explanation of symbols used:

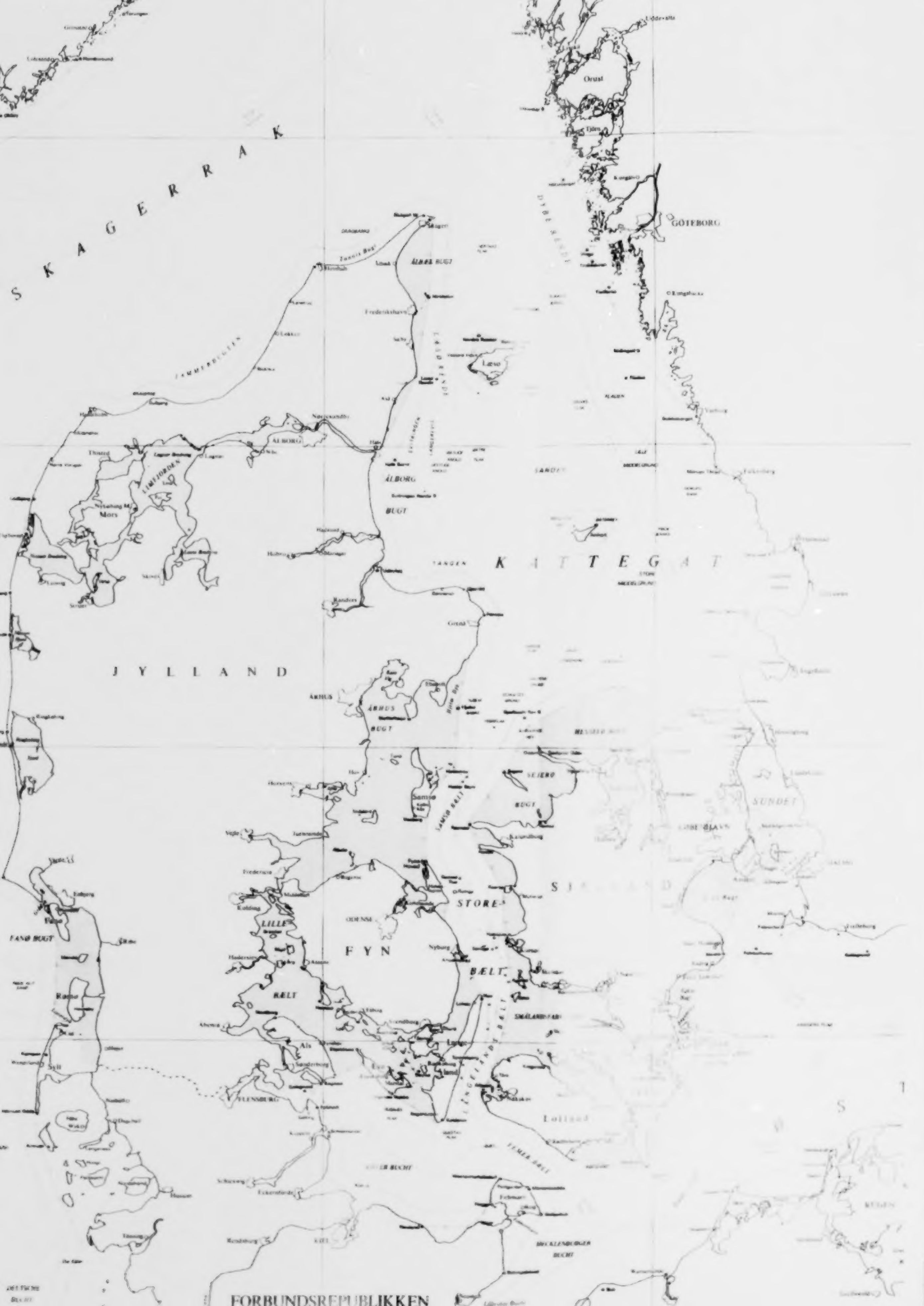
Dark pink: internal waters
Light pink: territorial sea
White: high seas

——△—— Limit of internal waters
— + + — Outer limit of territorial sea
+ - + - + International maritime boundary

Légende

Rose foncé: eaux intérieures
Rose clair: mer territoriale
Blanc: haute mer

——△—— Limite des eaux intérieures
— + + — Limite extérieure de la mer territo
+ - + - + Frontière maritime internationale


SKAGERRAK
KATTEGAT
JYLLAND
FYN
SJÆLLAND
Orust
Tjörn
Uddevalla
GÖTEBORG
Kungsbacka
Varberg
Falkenberg
Tannis Bugt
ÅLBORG BUGT
Frederikshavn
Læsø
JAMMERBUGTEN
Nørresundby
ÅLBORG
Thisted
LIMFJORDEN
Mors
Hals
ÅLBORG BUGT
TANGEN
Randers
Grenå
ÅRHUS
ÅRHUS BUGT
Horsens
Vejle
Samsø
SAMSØ BÆLT
SEJERØ BUGT
Kalundborg
SUNDET
KØBENHAVN
Fredericia
Kolding
LILLE BÆLT
ODENSE
Nyborg
STORE BÆLT
FANØ BUGT
Haderslev
Rømø
Als
Sønderborg
Sylt
FLENSBURG
Ærø
LANGELANDS BÆLT
Lolland
FEMER BÆLT
KIELER BUCHT
Fehmarn
Rendsburg
Kiel
MECKLENBURGER BUCHT
RÜGEN
Trelleborg
FORBUNDSREPUBLIKKEN

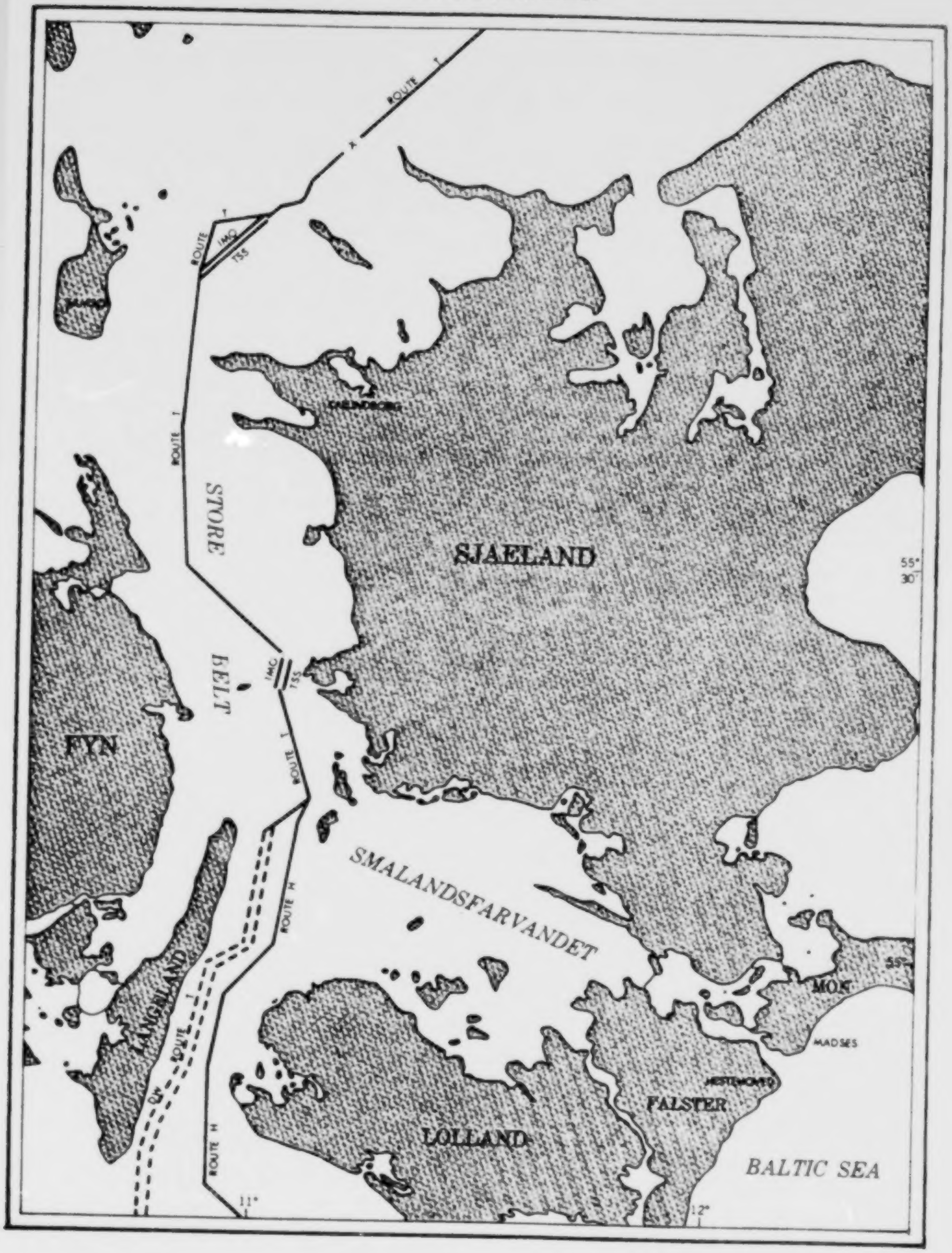
Annex 10

MAP SHOWING THE "ROUTE T" AND THE IMO ADOPTED TRAFFIC SEPARATION SCHEME THROUGH AND IN THE GREAT BELT

[See facing page]

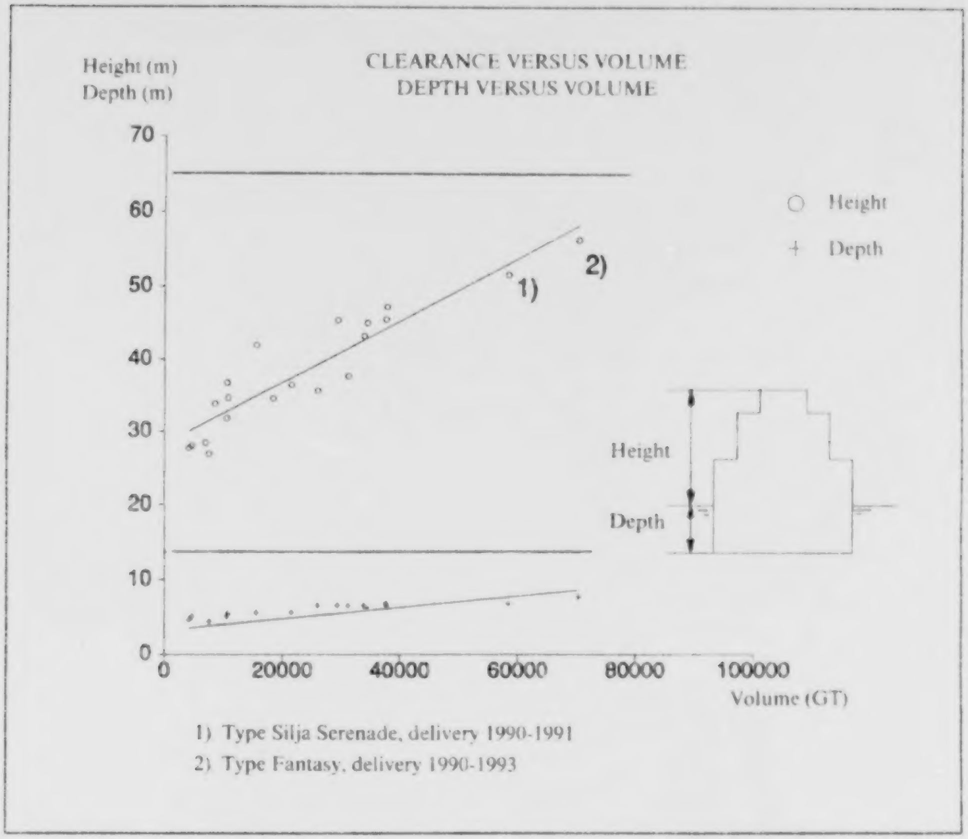
Source: Sailing Directions (Enroute) — for the Baltic Sea (Southern Part), 5th ed., 1989, Pub. 194, published by the Defense Mapping Agency, United States of America.

SECTOR 2. STORE BAELT


ROUTE T
ROUTE X
ROUTE T
IMO TSS
SAMSØ
KALUNDBORG
ROUTE T
STORE
BELT
IMO TSS
ROUTE T
SJAELAND
55° 30'
FYN
SMALANDSFARVANDET
ROUTE H
LANGELAND
ROUTE T
DW
ROUTE H
MØN
55°
MADSES
HESTEHOVED
FALSTER
LOLLAND
BALTIC SEA
11°
12°

Annex 11

CHART INDICATING THE HEIGHT OF PASSENGER SHIPS RECENTLY CONSTRUCTED IN FINLAND



1) Type Silja Serenade, delivery 1990-1991

2) Type Fantasy, delivery 1990-1993

Annex 12

BROCHURE OF THE GREAT BELT PROJECT ("STOREBÆLT")

[Illustrations not reproduced]

Storebælt

For many years Danish engineers and architects have been renowned for their design of beautiful bridges all over the world.

Denmark has now started work on building the largest bridge and tunnel project ever in the country's history: The Fixed Link across the Great Belt.

The Great Belt

The Great Belt — and the Cattegat — divide Denmark into equal halves in terms of population: On Zealand and Lolland-Falster live 2.5 million people, while another 2.5 million live on Funen and Jutland.

For the last two centuries there has been a permanent ferry service across the Great Belt, originally operated by the Postal Service. In 1883 DSB (Danish State Railways) took over the operation of the ferries. Today approx. 7,000 cars and 1,000 lorries per day make the crossing by car ferry. The railway ferries transport approx. 10,000 passengers and almost 6,000 tonnes of goods per day.

The island of Sprogo lies in the middle of the Great Belt. The island covers an area of 40 ha — and has two inhabitants. A 20-metre high lighthouse is located at the highest point of the island, 24 metres above sea level. In former times the lighthouse guided navigators across or through the Belt.

Excavations which have taken place in connection with the construction of the Great Belt Link indicate civilization and sea traffic 6-7,000 years ago.

The Fixed Link across the Great Belt

The Fixed Link across the Great Belt consists of:

A 6.6 kilometre bridge extending from Knudshoved on Funen and along an embankment west of Sprogo. The navigational clearance of the bridge is 18 metres above sea level. The bridge will carry both trains and cars.

The motorway and the railway will cross Sprogo and then separate, continuing on two embankments extending from the north-eastern part of the island. The railway descends into two eight-kilometre tunnels under the Eastern Channel. The tunnels will be bored between 10 and 40 metres below the seabed and end at Halsskov Point on Zealand.

The motorway extends from Sprogo to Zealand on an elevated bridge, which will be around 6.8 kilometres long. The navigational clearance of the bridge will be 65 metres above sea level.

The railway link will be built first and is expected to be completed in 1993. The motorway link is expected to be completed in 1996.

Paid for by users

When it is completed, the Great Belt Link will be paid for by the people who use it. A toll charge will be levied for crossing the Link.

The total construction budget in 1988 prices amounts to DKK 17.85 billion. The construction will be financed by loans raised by Great Belt A/S in Denmark and abroad on ordinary business terms.

Great Belt A/S will begin to pay interest and instalments on the loans when revenue begins to come from DSB in 1993, and from motorists in 1996.

It has been stipulated by law that DSB will pay for its share of the Fixed Link, i.e. the railway, over a 30-year period. The motorists will pay a fixed charge corresponding to ferry prices in 1987, with deduction of a small amount for motorists' own costs of driving across the Belt.

The motorway section of the Fixed Link is expected to have been repaid around the year 2010.

East Tunnel

The two railway tunnels under the Great Belt's Eastern Channel will be bored by four large boring machines.

The four tunnel boring machines for the tunnel have a diameter of 8.7 metres. Two machines will bore from Halsskov Point and two from Sprogø. The basis for the boring work is two ramps which at the deepest point are approx. 25 metres below sea level.

The boring work is expected to last for around 15 months.

As the tunnel boring machines work through the subsoil they will line the tunnel tube with a total of around 60,000 concrete elements. When boring of the tunnel has been completed, railway-technical installations, tracks, signals, etc. will be built.

The tunnels will be built by contracting consortium MT Group, consisting of Danish Monberg & Thorsen A/S, French Campenon Bernard SA and SOGEA SA, West German Dyckerhoff & Widmann AG and American Kiewit Construction Co. Ltd.

DSB (Danish State Railways) has been awarded the order for the railway-technical and electrical installations for the entire Fixed Link.

West Bridge

The West Bridge between Funen and Sprogø will be 6.6 kilometres long and of concrete, extending from a ramp north of Knudshoved Ferry Port to a ramp west of Sprogø. The bridge will curve slightly towards the south. The navigational clearance around the middle of the Western Channel will be 18 metres.

The bridge will be of 63 spans, of which 51 will be 110 metres long and 12 will be 82 metres long. Each span will consist of two girders, a narrow one for the two railway tracks and a wide one for the four-lane motorway, plus two emergency lanes. The underside of the bridge girders will be curved.

The substructure of the bridge, consisting of caissons of varying height below and two approx. 19-metre pier shafts above, will be cast onshore, and then each element will be towed out into the Western Channel and brought into position in the bridge alignment.

The superstructure — 2 × 63 bridge spans — will be cast onshore like the bridge piers. Each span will be sailed out to the bridge alignment, lifted into position above a bridge pier and cast together with the preceding span.

For transportation and lifting operations a 65-metre high mobile giant crane, with bottom measurements of 94 × 65 metres, will be used. It can lift over 6,000 tonnes, corresponding to the weight of the road girders, which are the heaviest elements for the West Bridge. The consortium European Storebælt Group, ESG, will build the West Bridge.

On the Danish side the consortium consists of Danish firms of contractors Per Aarsleff A/S, Højgaard & Schultz A/S and C. G. Jensen A/S. The foreign partners are Dutch firm of contractors Ballast Nedam Group bv, British Taylor Woodrow Construction Ltd. and Swiss Losinger Ltd.

East Bridge

The motorway link between Sprogø and Zealand will be built as a suspension bridge with a free span of 1,600 to 1,700 metres between the two middle bridge piers. The East Bridge will thus be the bridge with the largest free span in the world.

The total length of the bridge will be 6.8 kilometres, of which the stretch from anchor block to anchor block is approx. 2.7 kilometres. The remaining approx. 4 kilometres, the connecting spans, will be designed with bridge piers of concrete and bridge spans of either steel or concrete.

Each anchor block will have the size of a soccer field and weigh approx. 250,000 tonnes. The pylons of the East Bridge will be approx. 260 metres high.

The contract for the construction of the East Bridge is expected to be concluded in the first half of 1991.

Sprogø

Approx. one fourth of Sprogø will be affected by the Great Belt Fixed Link, which will cross the north-western corner of the island, while the rest of the island, with its lighthouse, buildings, cliff and coastline, will be preserved.

Embankments will be built towards east and west from Sprogø.

Architects and landscape architects are working on adapting the construction to the surroundings on Zealand, Sprogø and Funen.

The environment

In the preparatory work for the Fixed Link across the Great Belt great emphasis has been placed on adapting the construction to the natural surroundings and to conditions in the Great Belt and the waters outside the Belt.

It has been proved that the construction will have no impact on the marine environment in the Cattegat and the Baltic, while the environment immediately surrounding the Great Belt Link will naturally be influenced.

In co-operation with authorities and experts Great Belt A.S. has endeavoured to reduce these influences as far as possible.

An environmental plan of action has been implemented which means that construction works and the completed construction will be monitored around the clock. This will control that environmental plans are realized and that the environmental impacts of the construction are documented.

Time Savings and Traffic

Both railway passengers and motorists will save time after the Fixed Link has replaced ferry services. The time saving for traffic inside Denmark's borders will be around 75 minutes when the Great Belt crossing is included in the route. Time and cost savings are expected to result in increased traffic across the Great Belt.

In 1996 13,000 cars will cross the Great Belt Link per day. For the sake of comparison, in 1987 on average 24,000 cars crossed the Little Belt Bridges, while 12,000 crossed the Svendborg Sound Bridge per day.

Employment

Great Belt A/S expects that on average around 7,000 people will be employed from 1989 to 1995, when most of the construction work will take place. The figure covers those employed at Great Belt work sites and by sub-suppliers. The total labour demand in the construction period will be 50,000 man years.

Manpower consumption will peak in 1991-92 when work will be under way on all sections of the construction simultaneously.

Around 95 per cent of manpower is expected to be Danish.

Technical Data

The Fixed Link

Length : Around 18 km from the Nyborg coast to the Korsør coast. Two-track railway link, four-lane motorway link.
Travel time : Railway : 7 minutes. Motorway: 11 minutes.
Scheduled inauguration: Railway: Summer 1993. Motorway : Summer 1996.

The West Bridge

Combined motorway and railway bridge:
  Length : 6.6 km
  Navigational clearance : 18 m
  51 bridge spans of 110 m
  12 bridge spans of 82 m
Railway girder :
  Width : 12 m
  Height : 5 m at centre and 9 m above bridge piers
  Weight : 4,000 tonnes
Road girder :
  Width : 24 m
  Height : 3 m at centre and 7 m above bridge piers
  Weight : 6,000 tonnes
Construction volumes :

430,000 m^3 of concrete, a little under half for the bridge piers and a little over half for the bridge spans. Around 65,000 tonnes of reinforcement steel.

The East Tunnel

Bored railway tunnel :
  Length :
    Whole tunnel : 8 km
    Length of bored stretch : 7.4 km
  Greatest track depth below water surface : 75 m

The tunnel will be bored between 10 and 40 m below the seabed.
The tunnel will consist of two tubes with an external diameter of 8.5 m and an internal diameter of 7.7 m. There is a distance of 16.5 m between the tunnel tubes.
The tunnel tubes are lined with around 60,000 prefabricated reinforced concrete elements. Each element is 40 cm thick and 1.65 m wide in the direction of boring.

Each tunnel ring consists of 6 elements of 7 tonnes and a seventh 2-tonne locking element.
Cross tunnels are located at 250 m intervals between the tunnel tubes.
The cross tunnels are lined with cast iron elements.
The tunnels are bored by four tunnel boring machines. Each with a diameter of 8.752 m.
A fully equipped tunnel boring machine is 220 m and weighs approx. 1,600 tonnes.

Construction quantities :

800,000 m^3 of excavated materials
180,000 m^3 of construction concrete
20,000 tonnes of reinforcement steel
1,500 tonnes of cast iron

Around 70 pct. of the tunnel will be bored in marl and the rest in Ice Age deposits (moraine clay).

The East Bridge

Elevated bridge — suspension bridge

Length : 6.8 km
Free span : 1,600-1,700 m
Side span : Approx. 540 m
Navigational clearance : 65 m
Length from anchor block to anchor block : 2,700 m
Connecting span : Approx. 4,000 metres

Number of connecting spans : 24-32, depending on whether the superstructure is built of steel or concrete.
Height pylons : Approx. 260 m.
Construction quantities :

Superstructure of steel : 30,000-90,000 tonnes
Superstructure of concrete : 0-100,000 m^3
Substructure of concrete : 240,000-320,000 m^3

Great Belt Exhibition Centres

Great Belt A.S. has established two exhibition centres near the construction sites at Knudshoved and Halsskov, where visitors can study the construction work as it progresses via models, film, video, etc. In connection with the exhibition centres a cafeteria has been opened.

In the winter season from September 1 to April 30 the centres are open daily from 12 noon to 7 pm. Closed on Mondays. In the summer season from May 1 to August 31 opening hours are 10 am to 8 pm. Open every day.

Detailed information on group events, etc. may be obtained from the centres' administration in Halsskov on telephone (+45) 58 35 01 00.

Great Belt A.S.

Aktieselskabet Storebæltsforbindelsen (Great Belt A.S.) is wholly owned by the Danish State.

The object of Great Belt A.S. is to design, construct and operate the Fixed Link across the Great Belt.

The company employs external consultants to a significant degree and engages the contractors to carry out the actual construction work on the different sections of the Link.

On completion of the construction project, Great Belt A/S will maintain and operate the construction, which e.g. will involve collection of the bridge toll from motorists.

STOREBÆLT

A/S Storebæltsforbindelsen
Great Belt A/S
Vester Søgade 10
DK-1601 Copenhagen V
Tel.: (+ 45) 33 93 52 00
(Company Reg. No. 158205)

Annex 13

ORDINANCE NO. 437 (1985) GOVERNING THE DELIMITATION OF THE TERRITORIAL SEA (EXTRACT)

DENMARK

[Original: English]

1. Ordinance No. 437 governing the Delimitation of the Territorial Sea[a]

The breadth of the territorial sea, which consists of external and internal territorial waters, shall be measured according to the following provisions:

1. (1) The breadth of the external territorial sea shall extend from the parts of the sea which internally are limited by the lines set out in section 4 to the external parts of the sea of which the outer limit is the line every point of which is at a distance of 3 nautical miles (5,556 m) from the nearest point of the inner limit.

(2) The outer limits of the Danish customs area and fishing territory shall be as laid down specifically by law.

(3) With regard to the waters bordering on Sweden and Germany the outer limit of the external territorial sea must not exceed the sea borders and dividing lines for the territorial sea which are laid down in, respectively, the Declaration of 30 January 1932 between Denmark and Sweden concerning the delimitation of borders in the Sound, cf. Order No. 41 of 22 February 1932, and Order No. 497 of 21 December 1923 on the border between Denmark and Germany.

2. The internal territorial sea shall be the water areas such as harbours, harbour entrances, roadsteads, fjords, sounds and belts which are situated within the lines referred to in section 4.

3. The provisions of section 2, cf. section 4, shall not entail any restriction of the existing right of foreign ships to pass through the parts of the internal territorial sea in the Samso Belt, Little Belt, Great Belt and Oresund which are normally used for such passage.

4. The baselines for measuring the breadth of the external territorial sea shall be, as stated below and marked on the attached chart, the low-water line of the coastline (at mean spring) or straight lines between the following points:

*

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[a] Unofficial English text provided by the Permanent Mission of Denmark to the United Nations in a letter dated 24 October 1985. See also United Nations Legislative Series, ST/LEG/SER.B/15, pp. 71-76.

Illustrative map: Atlas of the Straight Baselines, part 1, edited by B. Francalanci, D. Romanò and T. Scovazzi (Milan, Giuffrè, 1986), p. 45.

* Rest of Ordinance contains geographical co-ordinates, pp. 123-129, and has been omitted.

Source: The Law of the Sea, Baselines: National Legislation with Illustrative Maps, United Nations, New York, 1989, p. 122.

REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES OF PROTECTION SUBMITTED BY THE GOVERNMENT OF FINLAND

DEMANDE EN INDICATION DE MESURES CONSERVATOIRES PRÉSENTÉE PAR LE GOUVERNEMENT DE LA FINLANDE

To the Registrar of the International Court of Justice.

1. I have the honour to refer to the Application dated 17 May 1991 by which Finland has instituted proceedings against Denmark relating to the right of free passage through the Great Belt; and hereby to submit, in accordance with Article 41 of the Statute and Article 73 of the Rules of Court, a request for the indication by the Court of provisional measures of protection for the preservation of the rights of Finland pending the final decision in these proceedings.

A. RIGHTS TO BE PRESERVED

2. The rights of Finland to be preserved are those relating to the continued passage of ships, including drill ships and oil rigs coming to or from Finnish ports and shipyards, through the strait of the Great Belt between the Baltic and the North Sea.

B. GROUNDS OF REQUEST

3. According to Danish Law No. 380 of 10 June 1987 a fixed traffic connection will be constructed over the Great Belt. The Danish Government has decided that the traffic connection in the main navigable channel in the Great Belt — the East Channel — will be a fixed suspension bridge which will allow free passage to ships of up to 65 metres height. In the exchanges between the Danish and Finnish Governments it has become apparent that there is no intention to build the bridge in such a fashion (by means of openings, a draw bridge or a "bascule" construction) that ships of more than 65 metres height could also pass under it.

4. The unilateral exclusion by Denmark of ships of over 65 metres height, including drill ships and oil rigs, from enjoying the right of free passage through the Great Belt constitutes the objet of the Application to which the present request relates.

5. The Danish authorities have informed the Government of Finland that they do not consider there to be any reason for engaging in negotiations to safeguard passage to and from Finnish ports and shipyards in the future by ships exceeding the height of 65 metres. In a letter of 20 February 1991 by the Prime Minister of Denmark, Mr. Poul Schlüter, to the Prime Minister of Finland, Mr. Harri Holkeri, he states that "there can be no question of modifying, let alone considering another alternative to the project at this advanced stage" (cf. Annex 7 to the Application). The East Channel bridge project will, then, continue on schedule and is expected to be completed in 1996.

6. Construction work for the East Channel bridge would prejudice the very outcome of the dispute brought before the Court by the aforementioned Application. The object of the Application relates precisely to the right of passage which the completion of the bridge project in its planned form will effectively deny. In particular, the continuation of the construction work prejudices the negotiating result which the Finnish submissions in the Application aim to attain.

C. The Facts of the Passage

7. Drill ships and oil rigs which extend to over 65 metres height have been constructed at the shipyard of Rauma-Repola Offshore Oy in Pori on the Baltic Sea from 1972. The company has built altogether 23 drill ships, semi-submersible and jack-up oil rigs. All of them have been delivered for use outside the Baltic Sea. Most of them have navigated to their production or exploration fields through the Great Belt.

8. The drill ships and oil exploration rigs manufactured by Rauma-Repola Offshore Oy are fully assembled already at the shipyard. Their navigating height thus varies between 80 metres (drill ships) to 150 metres (rigs). Offers have been made by Rauma-Repola Offshore for rigs of 170 metres height. The competitiveness of Finnish craft in the international offshore market is based precisely on the fact that all construction works can be completed already at the shipyard which is specially equipped for that purpose. It has been estimated that completing the construction only after the craft has passed the Great Belt, in the North Sea, will involve both an additional cost of approximately 30-55 million Finnmarks (US$7.5-13.75 million) plus an extension of the time of delivery of up to four months. This will inevitably destroy their competitiveness on the international market.

9. The production of drill ships and oil exploration rigs is an important part of the Finnish marine industry. During the period 1982-1988 the value of exports from offshore industry in Finland was between 8.5 to 24 per cent of the total value of exports from Finnish shipyards. Shipbuilding, again, accounted for approximately 10 per cent of the value of exports from metal and engineering industry. The cost of one drill ship or oil exploration rig is approximately 400 million Finnmarks (US$100 million). It has been estimated that the offshore oil exploration market will be needing from 200 to 400 new offshore exploration rigs or drill ships in the 1990s. Assuming a market share similar to that in the 1970s and 1980s, Rauma-Repola Offshore Oy can be assumed to have a demand for 10-20 drill ships and rigs in the 1990s. Currently, two jack-ups are being constructed in co-operation with a corporation from the Soviet Union. Both of these will, when assembled, exceed the height of 65 metres.

10. The geographical situation of Finland in relation to world oceans has been explained in detail in the Application. The only deep-water route between the Baltic and the North Sea traverses through the Great Belt. For many of the craft produced in Finland, the Great Belt remains the only available passage-way.

D. Urgency of the Request

11. Construction work for the East Channel bridge has not yet commenced. The submission of tenders for the bridge, however, took place in December 1990 and, as Finland understands the matter, the contracts are due to be signed during late spring or early summer of 1991. This means that the Danish Government, through agreements entered into by the State-owned bridge company (The Great Belt A.S.), is close to binding itself legally with private contractors to undertaking the project as planned.

12. The very existence of the Danish bridge project as presently planned will make it difficult for the Finnish company Rauma-Repola Offshore Oy to obtain, even less to accept, new orders for the construction of drill ships and oil exploration rigs, given that they can no longer rely on the continued passage of such vessels through the Great Belt. The starting and, even more so, possible comple-

tion of the bridge project by Denmark in its presently planned form will aggravate such harm. Inability to deliver completed drill ships and oil rigs will necessitate at least a temporary closure of the shipyard at Pori. The losses to Rauma-Repola Offshore Oy and its approximately 900 employees which will result from the impossibility to deliver to their world-wide customers drill ships and oil exploration rigs constructed in Finland cannot be offset by eventual compensation should the Court decide in favour of Finland on the merits of the case. The granting of the provisional measures requested is the sole means to ensure that Finnish rights and interests are not irreparably prejudiced during the currency of the present proceedings.

E. Proposed Provisional Measures

13. In the light of the foregoing considerations, Finland has the honour to request that the Court indicate the following provisional measures to protect the Finnish rights and interests which are the object of the Application of 17 May 1991 instituting proceedings against Denmark in this case:

(1) Denmark should, pending the decision by the Court on the merits of the present case, refrain from continuing or otherwise proceeding with such construction works in connection with the planned bridge project over the East Channel of the Great Belt as would impede the passage of ships, including drill ships and oil rigs, to and from Finnish ports and shipyards; and

(2) Denmark should refrain from any other action that might prejudice the outcome of the present proceedings.

Helsinki, 22 May 1991.

(*Signed*) Tom GRÖNBERG,
Agent of the Government of Finland.

WRITTEN OBSERVATIONS OF DENMARK ON THE REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES

OBSERVATIONS ÉCRITES DU DANEMARK RELATIVES À LA DEMANDE EN INDICATION DE MESURES CONSERVATOIRES

PART I

THE FACTS

A. The Geography and Transport Policy of Denmark

1. Denmark consists of the peninsula Jutland, the two major islands Zealand and Funen and a number of small islands. Almost half of the five million Danes lives on Zealand and its neighbouring islands, including Lolland, Falster, and Moen, all being connected with Zealand by bridges. The other half of the population lives on Funen and Jutland. Since 1935 Jutland and Funen have been linked by a bridge across the Little Belt. In 1970 a second bridge across the Little Belt was opened.

2. The Great Belt is the strait between Zealand and Funen. In the middle of the Great Belt lies the small island of Sprogoe. This island divides the Great Belt Strait into two channels, the Western Channel between Funen and Sprogoe, and the Eastern Channel between Sprogoe and Zealand. The area of the construction of the Fixed Link across the Great Belt lies entirely within the territorial sea of Denmark, see Map II.

3. Copenhagen, the capital of Denmark, is situated on Zealand. The major part of the central administration, cultural institutions of major importance for the national heritage and a substantial part of the Danish business community are placed in or around Copenhagen. Transportation of passengers and goods between the two parts of the country and from the part of the country east of the Great Belt to the European continent has to take place by ship or air until the fixed link across the Great Belt has been established. With a minimum width of 18.5 kilometres, the Great Belt constitutes a barrier between the two parts of Denmark.

4. The establishment of a fixed link across the Great Belt has for a long period of time been regarded as an undertaking of paramount national interest.

5. Surveys have shown that the volume of both passengers and goods carried by ferry crossings on the Great Belt is substantially smaller than the volume of passengers and goods transported between corresponding parts of the country connected by road and rail via bridges. The fixed link will reduce the travel time by rail and by car between the two halves of Denmark by more than one hour. During peak periods the reduction in travel time will be

substantially more. This will be of major benefit for the business community. It will improve the conditions for a more rational production and transport. The cost of storage and stock will be reduced due to the enhanced transportation possibilities. The fixed link will increase the level of mobility in the labour market facilitating commuting by persons resident on the western part of Zealand or on Funen to work on the other side of the Great Belt.

6. Zealand makes up the geographic link to Sweden and thereby, also to Norway and Finland. The fixed link will therefore contribute towards enhanced transport services between the Nordic countries and the rest of Europe.

7. The daily passenger traffic in 1988/1989 between East Denmark and West Denmark was 42,000 passengers; out of these, 21,400 passengers were crossing the Great Belt. Forecasts of inland transport show an increase in this traffic to 55,300 passengers in 1994 when the rail link is scheduled to open and 67,500 in 1997 when the road connection is planned to open, see paragraph 33 below. Out of the 67,500 of the daily passengers between East and West Denmark 58,000 are expected to use the Great Belt link.

8. The goods traffic forecast shows an increase in the daily volume of traffic between the two parts of the country from 22,000 tonnes in 1988/1989 to 28,000 tonnes in 1994 and to 34,500 tonnes in 1997. Today about half of the daily tonnage is carried via the Great Belt. Carriage across the Great Belt will account for a daily 15,000 tonnes out of a total quantity of 28,000 tonnes by 1994, and 24,000 tonnes out of the 34,500 tonnes by 1997. By then the Great Belt Link will have become the undisputed hub of the Danish traffic network.

9. To enhance the safety of navigation the Government of Denmark has established a route between Skagen and the area northeast of Gedser through the Great Belt with a minimum depth of 17 metres. Due to the occurrence of unknown and moving obstructions the depth of "Route T" may be reduced to 15 metres. Map I indicates the official depths of both the Great Belt and the Sound between Denmark and Sweden.

10. The total north - and southbound traffic of merchant ships of 50 GRT and above in the Great Belt has been more or less constant during the period 1975 - 1989 at around 20,000 - 22,000 movements per year with a slowly falling trend. However, the total tonnage has increased. Around 80 per cent. of the traffic pass through the Eastern Channel. In the same period, on the average less than one Finnish offshore unit per year has passed through the Great Belt.

B. The Great Belt Project

11. The Great Belt Project was initiated in 1948 when a Governmental Commission was established to study the possibilities for constructing a bridge across the Great Belt. The final report of the Commission published in 1960 suggested, *inter alia*, the construction of a high-level bridge.

12. In 1961 the Danish Parliament, *Folketinget*, passed Act No. 379 which authorized an investigation of the possibilities of constructing a road and rail bridge across the Great Belt. Following the results of this investigation the Danish Parliament passed Act No. 414 of 13 June 1973 on the Construction of a Bridge across the Great Belt (Annex 1). On the basis of the Act, preparatory work was initiated.

13. By Circular Note of 12 May 1977, the Ministry of Foreign Affairs advised all Heads of Foreign Diplomatic Missions accredited to Denmark of the Great Belt Project which included a high-level bridge across the Eastern Channel with a free vertical clearance for passage of 62 metres above sea level (Annex 2). Several missions acknowledged receipt of the Note, whereas only the USSR and Poland reacted in substance to the notification. In a Note of 29 March 1978 the USSR requested that the bridge should have a clearance for passage of 65 metres (Annex 3). In the reply of the Government of Denmark of 28 June 1978 the Embassy of the USSR was asked to submit information to support the need for a 65 metres clearance (Annex 4). In a Note of 6 December 1977 Poland suggested that future trends within the shipbuilding should be taken into consideration (Annex 5). The Government of Denmark replied in a Note of 3 July 1978 (Annex 6).

14. The Danish Prime Minister announced in his opening address to the Danish Parliament on 3 October 1978 that due to financial considerations the Government had decided to postpone the implementation of the Great Belt Project. The Prime Minister stated that the Government would give Parliament a more detailed account of the issue.

15. This account was given by the Minister of Public Works on 17 October 1978. The Minister stressed that the Great Belt Project was merely postponed and stated that the Government expected that the necessary preconditions for resuming the Project would not be present until 4 - 5 years had passed. Thus, the Finnish statement in paragraph 21 of the Application that the Project was suspended *sine die* is not correct.

16. In accordance with the prediction given by the Minister of Public Works in Parliament in 1978, investigations were commenced in 1983 to evaluate the technical and economic possibilities for the implementation of the Great Belt Project. In 1986 it was announced that the Government of Denmark and the Social Democratic Party, the largest political party in Denmark, had agreed that a fixed link across the Great Belt should be established. The Danish Parliament subsequently passed Act No. 380 of 10 June 1987 on the Construction of a Fixed Link across the Great Belt (Annex 7).

17. The 1987 Act provides for the construction of a fixed link across the Great Belt for rail connection and a motorway. According to the Act the rail connection shall be established as a tunnel under the Eastern Channel and a low-level bridge over the Western Channel. The motorway shall also cross the Western Channel on the low-level bridge. Regarding the crossing of the Eastern Channel by the motorway the Act provides that the motorway shall cross either on a high-level bridge allowing for the necessary navigational passage or through a tunnel. In the official comments to the Bill it was stated that the high-level bridge provided for in the 1973 Act was the preferred alternative.

18. According to the Act a government-owned public limited company, *A/S Storebæltsforbindelsen*, was to undertake the planning and implementation of the Project.

19. By Circular Note of 30 June 1987 the Danish Ministry of Foreign Affairs advised all Heads of Foreign Diplomatic Missions accredited to Denmark of the Project (Annex 8). The diplomatic missions were informed that the traffic link crossing the Eastern Channel would be either a high-level bridge or a tunnel. This note did not give rise to any reactions from foreign States.

20. On 4 November 1988 it was decided that the Project should consist of a 6.6 kilometre road and rail bridge spanning the Western Channel. This bridge was to have a navigational clearance of 18 metres. The crossing of the Eastern Channel was to be effected by a railway tunnel and a high-level road bridge, see sketch in Annex 9. The high-level bridge was chosen in lieu of a tunnel for reasons of technology, safety and economy.

21. On 16 June 1989 the Minister for Transport decided that the high-level East Bridge should have a clearance of 65 metres. The height of 65 metres met the request of the USSR and conformed with international practice, see paragraphs 60 - 67 below. Denmark based its decision on a report by *Det Norske Veritas*, an internationally renowned classification agency. The report from *Det Norske Veritas* is submitted as Annex 10. The report by *Det Norske Veritas* showed that all merchant vessels could pass under a bridge. A clearance of 76 - 77 metres to allow for the passage of drill ships had been contemplated when the Bill was submitted. It was, however, subsequently established that drill ships with drill towers exceeding 65 metres in height would be able to pass through the Sound.

22. By Circular Note of 24 October 1989 from the Danish Ministry of Foreign Affairs all Heads of Missions accredited to Denmark were advised of the decision concerning the Great Belt Project (Annex 11).

23. Safety of navigation has been of major concern to the Danish authorities. Consequently, as a result of study relating to different types of bridges, Denmark chose not to be content with the stipulated requirement for two navigation lanes with a minimum breadth of 375 metres each as mentioned in the 1989 notification. For purposes of optimum maritime safety as prescribed by technical experiments, including experiments of simulated navigation, Denmark in 1990 opted instead for the more expensive solution in

the form of a 1,624 metre suspension bridge to guarantee vessels continued free passage under *a single* span with a full clearance of 65 metres within a width of 750 metres.

24. The measures taken by Denmark to ensure safety of navigation in connection with the building of the East Bridge across the Great Belt were formally discussed and unanimously approved at meetings in the International Maritime Organization (IMO) in September 1990 and May 1991 during which Finland was present.

25. The Great Belt Project, which constitutes an integrated whole, is to be carried out in such a way that the railway connection will be completed first. Notice for tender by restricted procedure for the tunnel under the Eastern Channel was given on 28 July 1987, tender documents were submitted on 26 February 1988, offers were submitted on 30 June 1988, and a contract for the tunnel was signed on 28 November 1988. The tunnel works started immediately after the signing of the contract.

26. Notice for tender by restricted procedure for the West Bridge was held on 9 October 1987, tender documents were submitted on 7 March 1988, and offers were submitted on 30 November 1988. The contract for the West Bridge was entered into on 26 June 1989. The works on the West Bridge started shortly after the signing of the contract.

27. The implementation of the Project involves substantial approach and access work on and around the island of Sprogoe. Notice for tender by restricted procedure for this work was held on 28 July 1987, offers were submitted on 24 January 1989 and the contract was signed on 26 June 1989.

28. Notice for tender by restricted procedure for the East Bridge was held on 15 July 1989, tender documents were submitted on 31 May 1990, and offers were submitted on 18 December 1990. The offers submitted expire on 18 August 1991.

29. The construction costs of the Great Belt Project are forecast to be DKK 19,030 million (USD 2,927 million)[1], in 1988 prices. These costs do not include financial expenses. The total cost of the Project including financial expenses and price increases due to inflation is expected to be approximately DKK 30,000 million (USD 4,457 million).

30. As of 31 May 1991 contracts totalling 56 per cent. of the total construction budget for the Great Belt project have been entered into, and an amount corresponding to 28 per cent. of the total construction budget for the Great Belt Project has been paid to the contractors.

31. The physical status of the Project as of 15 June 1991 can be summarized in the following way: The work on the West Bridge is on schedule. A work site of 300,000 square metres with production facilities has been established on Funen. A substantial number of caissons, pier shafts and bridge girders has been cast. The positioning of the caissons started on 23 April 1991. Four caissons have already been positioned. The first girder will soon be in place above the water off the port of Knudshoved. The construction site for the tunnel works consisting of 550,000 square metres also with extensive production facilities has been completed. The production of the 60,000 tunnel lining elements and other work in connection with the tunnel is carried out according to the plans. The drilling of the tunnel is delayed due to technical problems with the tunnel boring machines. The approach and access work on and around the island of Sprogoe is close to completion.

32. *A/S Storebæltsforbindelsen* has evaluated the tenders submitted for the East Bridge and is in the process of entering into contract negotiations with the designated contractors.

33. Preparatory work for the East Bridge has been completed with the construction of a 25 metre high access ramp at Sprogoe and of four artificial islands for the protection of the anchor blocks in the Eastern Channel. The navigational Route T of the Eastern Channel of the Great Belt will be spanned

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[1] *Throughout these Written Observations figures in Danish Kroner have been converted into US Dollars on the basis of the rate of exchange on 7 June 1991 when 100 US Dollars (USD) equalled Danish Kroner (DKK) 673.15.*

by the suspension part of the East Bridge. The cable works for this span will not be initiated until late 1994. The bridge is expected to open for traffic during the year of 1997.

34. Major work is being carried out in order to connect the Great Belt Link with existing railways and motorways. 7 kilometres of new railway is being laid on Zealand and Funen, 4 kilometres of new motorway is being constructed, a new railway bridge and a new motorway bridge are being constructed, and an existing motorway bridge is being raised.

35. Today almost 3,000 people are working on the large construction sites around the Great Belt. The total number of employees involved in the project, including sub-contractors and suppliers, is estimated at approximately 11,000. The East Bridge project will prompt a considerable increase in the number of employees.

C. Consultations between Danish and Finnish Representatives

36. In its Request the Government of Finland has informed the Court that Finnish drilling rigs have been transported through the Great Belt since 1972. As stated above in paragraphs 13 and 19, Finland was directly informed of the Great Belt Project by Circular Notes in 1977 and 1987. Other Baltic States reacted to these Notes, but no reaction was received from Finland.

37. It was not until 18 July 1989 that Finland reacted by a letter from the Commercial Department of the Embassy of Finland in Copenhagen addressed to the Danish Maritime Authority (Annex 4 to the Application). In the letter it was stated that according to available information Finland's large transports, e.g., drilling platforms with a free height of 150 metres, would be obstructed by the new bridge. If this was the case, Finland requested information on possible alternative routes. The Finnish letter was answered by the Danish Ministry of Foreign Affairs on 29 August 1989 confirming that passage under the bridge would not be possible for structures measuring 150 metres in height. The Danish Ministry of Foreign Affairs pointed out that such structures would be able to pass through the Sound provided their draught did

not exceed 8 metres. Moreover, it was suggested that the rigs be transported partly dismantled thus permitting passage under the Great Belt Bridge (see Annex 5 to the Application).

38. On 24 October 1989 the Danish Ministry of Foreign Affairs issued another Circular Note advising on the decision to build a high-level bridge over the Eastern Channel. In the period July 1989 to May 1990 the Danish authorities received no further inquiries or other reactions from Finland. It was not until May 1990 that Finland asked for informal talks to discuss aspects of international law pertaining to the passage of drilling platforms through the Great Belt. From the Danish side it was maintained that the fixed link was in conformity with international law allowing ships of all nations which had used the Great Belt to pass under the bridge with its clearance of 65 metres.

39. On 19 June 1990 the Embassy of Finland sent a Note to the Danish Ministry of Foreign Affairs (Annex 12) stressing that the bridge would impede transport of offshore constructions through the Great Belt. Finland requested that negotiations be initiated to secure the free passage of the Finnish offshore units prior to any final decision on the bridge project.

40. In the following months meetings were held and Notes were exchanged between the Parties (Annexes 13 and 14). Denmark pointed out that the practical solution to the problem would be to complete the assembly of the oil rigs after the bridge had been passed. The Finnish delegation rejected this solution as it would allegedly deprive the private Finnish shipyard Rauma-Repola Offshore Oy of its competitiveness. The Finnish delegation never put forward any suggestions as to how a technical solution to its problem could be found.

41. While retaining its position that the fixed link in its entirety conformed to the requirements of international law Denmark undertook at the request of the Finnish side to investigate on a no-prejudice basis the possibility of inserting a passage opening in the West Bridge, either as a dismountable span or a movable bridge. However, the conclusion was that it would not be possible to modify the West Bridge as requested by the Finnish side.

42. The Danish points of view were summed up in the letter of 20 February 1991 from the Danish Prime Minister to his Finnish counterpart (see Annex 7 to the Application).

D. The Passage Route through the Sound

43. In its first inquiry to the Danish authorities regarding transport of large offshore constructions through the Great Belt, Finland requested information on other feasible routes through the Danish straits (Annex 4 to the Application). In its reply Denmark pointed out that the Sound could be used as an alternative route without any limitations as to the height of the constructions (Annex 5 to the Application).

44. The Sound is a relatively narrow strait separating Denmark from Sweden. The deepest navigational route through the Sound passes between the Danish islands of Amager and Saltholm, a passage known as the Drogden. The Drogden, which is the most shallow part of this navigational route through the Sound, has an official minimum depth of 7.7 metres and a width of 290 metres (see Map I).

45. As will be demonstrated, this minimum depth of 7.7 metres in the Drogden would have allowed for transportation through the Sound of all drill ships and almost all oil rigs ever constructed by the Finnish ship yard Rauma-Repola Offshore Oy. These transports could have passed through the Sound without any technical modifications or alterations of the oil rigs or drill ships.

46. On 23 March 1991 the Danish and Swedish Governments in principle agreed on the establishment of a fixed link across the Sound. As of June 1991 the project has been formally approved by the Swedish but not yet by the Danish Parliament. The project comprises a bridge between Sweden and an artificial island south of Saltholm and an immersed tunnel from the artificial island south of Saltholm to the Danish island of Amager, i.e., crossing the Drogden. Due to the proximity to Copenhagen International Airport on Amager, a bridge between Amager and the artificial island south of Saltholm has been excluded from consideration. The project also envisages that the

official depth of the Drogden will remain at the present 7.7 meters. A fixed link across the Sound will thus not affect the passage through the Drogden.

E. The Finnish Mobile Offshore Drilling Units

47. Worldwide a variety of designs exists for Mobile Offshore Drilling Units (MODUs) but nearly all these designs follow one of three basic design principles called Drill Ships, Semi-Submersibles and Jack-Ups.

48. MODUs within each of these groups will therefore have common basic design principles, but there are variations of size and detailed design between the individual units in the groups.

49. All drilling units are equipped with a high tower (derrick) used for handling and storing drill pipe sections. The drill pipe sections are normally 30 metres high and the derrick more than 50 metres high. To the derrick height must be added the deck elevation and derrick substructure height to find the distance from sea level to the top of the derrick.

50. The main characteristics for each of the three different MODU types may be described as follows:

51. *Drill Ships* normally have hull and machinery corresponding to ships used for other purposes. Drilling is performed while the ship is floating, held on location either by anchors or dynamic positioning. Only the derrick will be higher than 65 metres above sea level. The draughts of drill ships vary considerably and for some designs it could in some conditions be more than 7.7 metres. The draught of the individual unit depends on the load carried and the ballast condition. In transport condition it is normally possible to obtain a draught which is significantly less than 7.7 metres. The 3 drill ships built by Rauma-Repola Offshore Oy all have transit draughts of 7.3 metres (see para. 17 in the Application).

52. *Semi-Submersibles* are floating drilling units where the influence of waves has been minimized by having only a small cross-section at the

waterline. The main buoyancy chambers are located below the sea surface in drilling but not necessarily in transportation mode, and columns from the buoyancy chambers give additional buoyancy and support for the platform, which is always kept above the water level. While drilling, the units are held on location by anchors or dynamic positioning. Only the derrick will be higher than 65 metres above sea level. The draughts of semi-submersibles in transport condition vary, but according to information available to Denmark only one of the semi-submersibles built by Rauma-Repola Offshore Oy has a transit draught of more than 7.6 metres.

53. *Jack-Ups* have - often triangular - hulls which float during transport and are supported on long legs standing on the sea floor during drilling operations. During transport nearly the full leg length will be above sea level. During transport of jack-ups normally both the legs and the derrick will be higher than 65 metres. The legs of the largest existing platform designs are close to 200 metres high. The draught of jack-up platforms when towed or floating is normally between 4 - 6 metres. While towing is the normal procedure of transporting jack-ups, carriage by heavy-lift ships is often used for transport over very long distances. The draught of these heavy-lift ships during transports may be between 6 - 10 metres depending on the load carried. When towed none of the jack-ups built by Rauma-Repola Offshore Oy has a transit draught exceeding 6.4 metres.

54. A list of all drill ships, semi-submersibles, and jack-ups produced by Rauma-Repola Offshore Oy in the period 1974 - 1990 is submitted as Annex 15. The list gives the name, delivery date, and transit draught of each drilling unit. Annex 15 should be read in conjunction with the Rauma-Repola Offshore Oy Sales Folder (Annex 16) showing photographs of each of the drilling units produced by the yard in the period 1974 - 1990.

55. It might be inferred from Finland's Application and Request that the Great Belt is the only waterway available to the Finnish offshore drilling units for passage to and from the Baltic. This is not correct. All of the Finnish produced drill ships may sail and all of the Finnish produced jack-ups may be towed through the Sound. As stated above in paragraphs 44 - 45, the Sound has an official minimum depth of 7.7 metres, and Annex 15 demonstrates that all drill ships and jack-ups ever produced by Rauma-Repola Offshore Oy have

transit draughts of considerably less than 7.7 metres. Thus, the East Bridge of the Great Belt Project will not prevent the passage of Finnish drill ships or jack-ups to and from the Baltic, as all of these units may be transported through the Sound without any technical modifications to their design.

56. Based *inter alia* on the transit draught specifications of Annex 15 Denmark is of the opinion that also most of the semi-submersible drilling units produced by Rauma-Repola Offshore Oy may be transported through the Sound without technical alterations. The draught figures quoted in Annex 15 are for normal transit conditions. For passage through the protected Danish straits the transit draught of a semi-submersible may if necessary be reduced even below the quoted transit draught by using less than full ballast or by limiting the load carried.

57. The very few semi-submersible drilling units that due to their draught will not be able to pass through the Sound, will have to use the Great Belt. For this type of unit, passage under the East Bridge with its clearance of 65 metres will merely require that part of the drilling tower (derrick) is left unassembled until after passage of the bridge. Subsequent assembly of the derrick is a relatively simple operation that in some cases has been executed on Danish drilling units at sea without docking at a yard. Such subsequent assembly of the derrick is standard procedure at a number of offshore yards throughout the world located behind bridges on rivers or canals.

58. In the opinion of Denmark, subsequent assembly of the derrick of a semi-submersible is thus the only modification relevant to the discussion of the continued passage of the Finnish units through the Danish straits as all the Finnish drill ships and jack-ups and the majority of the semi-submersibles may be transported through the Sound. In its Request, paragraph 8, Finland has alleged that completing the construction of the unit after passage of the bridge will involve an additional cost of USD 7.5 - 13.5 million per unit and an extension of the date of delivery of 4 months. These figures cannot refer to subsequent assembly of the derrick of a semi-submersible. According to Danish experts, completing the assembly of the drill tower of a semi-submersible after passage of the bridge will take less than one week and cost

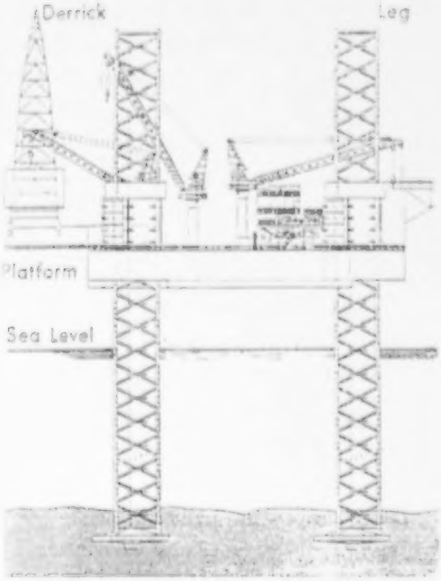
less than USD 1 million. The figures quoted by Finland are thus either irrelevant or grossly exaggerated.

59. In its estimate of the expected volume of Rauma-Repola Offshore Oy's future production Finland states that the yard will have a demand for 10 - 20 drill ships and oil rigs in the 1990s, see the Request, paragraph 9. Obviously, the volume of future production is by nature difficult to predict. It should not be overlooked, however, that according to information available to Denmark Rauma-Repola Offshore Oy produced its last mobile offshore drilling unit in 1985 and since then the yard has only assembled two jack-ups in 1988 and 1990.

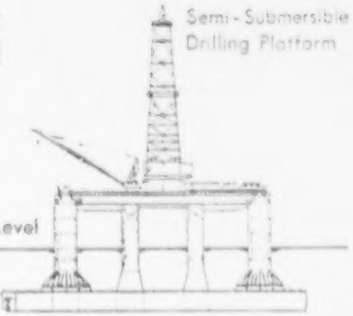
Mobile Offshore Drilling Units

Different Design

During transport the legs of the Jack-up platform are raised so that the lowermost part of the legs are directly underneath (the floating) Platform.

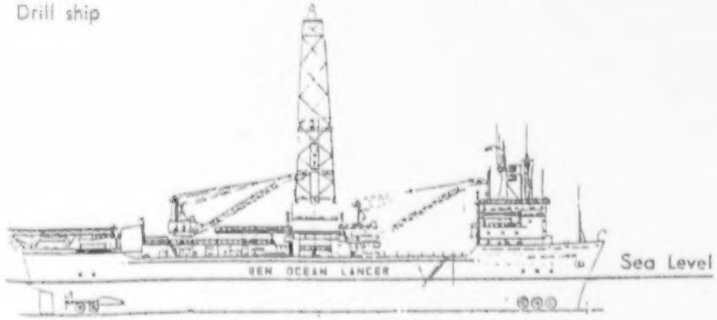

Derrick
Leg
Platform
Sea Level

Jack-up Drilling Platform
(in Drilling Position)



Semi-Submersible Drilling Platform

Drill ship


BEN OCEAN LANCER
Sea Level

F. Vertical Clearance of Existing Bridges across International Straits and Waterways

60. The legal implications of the construction of the East Bridge with respect to the right of innocent passage will be dealt with below in Part II, The Law, where it will be demonstrated that international law does not prohibit the building of bridges across international straits as long as existing shipping traffic is not hampered by the construction.

61. International straits with a status similar to that of the Great Belt exist in Turkey and in Japan.

62. The Bosphorus Bridges in Turkey built in 1973 and 1988 both have vertical clearances of 64 metres, restricting the height of all vessels sailing to and from Bulgaria, Rumania, and the Black Sea ports of the Soviet Union and Turkey.

63. In Japan, the Kanmon Bridge from 1971 has a clearance of 61 metres. The bridges connecting Honshu and Shikoku have a clearance of 65 metres.

64. Bridges are also to be found across canals open to international ship traffic, with the following vertical clearances.

Panama Canal, Panama	65 metres
Kiel Canal, Germany	42 metres

65. Across the entrances to major ports served by international shipping routes the vertical clearances are:

Verrazano Narrows Bridge, New York	66 metres
Golden Gate Bridge, San Francisco	67 metres
Bay Bridge, San Francisco	65 metres
Lions Gate Bridge, Vancouver	60 metres
Tagus River Bridge, Lisbon	70 metres (due to local topography)
Maracaibo Bridge, Venezuela	45 metres
Guanabara Bay Bridge, Rio de Janeiro	63 metres
Sidney Harbour Bridge, Sidney	52 metres
Älvsborg Bridge, Gothenburg	45 metres
Yokohama Bay Bridge, Yokohama	55 metres

66. The clearances vary between 42 and 70 metres. Apart from the extremes, it is obvious that the clearances concentrate around 60 - 65 metres. All of the above clearance figures are based on official sea charts.

67. A bridge clearance of 65 metres takes account of the maximum height of contemporary ships and may now be considered an "international standard" for bridge heights.

G. The Effects of an Interruption of the Great Belt Project

68. Should the Court comply with Finland's Request for provisional measures thereby suspending the motorway part of the Great Belt Project major losses will be suffered by *A/S Storebæltsforbindelsen* as well as by the Danish society in general. The fact that the Great Belt Project has already progressed to an advanced stage has a significant bearing on the magnitude of these losses.

69. The losses inflicted upon *A/S Storebæltsforbindelsen* if the works on the East Bridge were to be suspended for a three year period, i.e., from 1 August 1991 to 31 July 1994 have been calculated by *A/S Storebæltsforbindelsen* as follows:

Increased project costs (excluding interest):	DKK 850 million	USD 126 million
Increased interest costs (including interest on the investments in the motorway part of the West Bridge:	DKK 1,050 million	USD 156 million
Loss of net earnings due to the delay of the opening of the fixed road link:	DKK 1,150 million	USD 171 million
In total:	DKK 3,050 million	USD 453 million

70. The amounts are given as net present values as of July 1991. In the calculations a rate of inflation of 5 per cent. per annum and a 10 per cent. interest rate per annum on debt has been used.

71. The increased project costs include preparation of design, prequalification of tenderers, invitation to tender, evaluation and award of contracts, price changes, and additional expenses incurred by the head office of *A/S Storebæltsforbindelsen*.

72. All investments in the road link are to be paid by toll fees from the users. A delay of the opening of the East Bridge will cause a loss of net earnings from toll fees.

73. In the Danish Parliament's decision to establish the Great Belt Project the positive impact of the Project on the economy of the Danish society has played a decisive role. On the basis of the present budget and time schedule of the Project, the social rate of return on the total Great Belt Project has been calculated at 11.8 per cent. per annum.

74. The calculation of the cost/benefit of the Great Belt Project is mainly based on an estimate of the time saved by the users and the anticipated

reduction of costs for purchase and operation of ferryboats. It also includes an estimate of the particular logistic advantages for industry and trade that will be created by the Project.

75. A delay in the motorway link will cause difficulties for the planning in those sectors of the Danish society that are dependent on or influenced by the motorway link.

76. The ferryboat companies operating the present lines between the Eastern and the Western parts of Denmark will have to change plans at a late stage due to a delay in the motorway project. A delay will have an impact on decisions concerning investments, major repairs, and lease contracts in relation to the ferry services.

77. Town planning related to the development of sites presently used in connection with the ferryboat operations will be adversely affected by a delay.

78. Long-term employment planning for work forces in areas close to the construction works and in other regions of Denmark providing labour for the Project will be detrimentally influenced by a delay.

79. Within trade and industry, the already commenced process of adjusting to the new, faster means of communication between the Eastern and Western parts of Denmark will be disturbed. The anticipated rationalization of the logistics pertaining to stock and storage will be postponed.

80. The return on the major investments made in order to connect the existing motorway system to the Great Belt Project will be deferred by a period corresponding to the delay.

81. A suspension of the works on the East Bridge will, therefore, have a substantial negative impact on the economy of the Danish society.

PART II

THE LAW

A. Introduction

82. The Statute of the Court provides in Article 41 that "(t)he Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party."

83. The object of this provision has been explained by the Court in its case law on Article 41 and may be summarized as follows:

(1) Article 41 has as its object to preserve the respective *rights* of the parties pending the final judgment of the Court;

(2) The Court's power to indicate provisional measures *presupposes*

- that there is a risk of *irreparable prejudice* to rights which are the subject of dispute in judicial proceeding,
- that the measures requested are a matter of *urgency*,
- that the rights claimed in the Application, *prima facie*, appear to fall within the purview of the Court's *jurisdiction;*

(3) The Court's power under Article 41 shall only be exercised if the *circumstances so require*.

84. The Court's jurisdiction is not in dispute in so far as both Denmark and Finland according to their longstanding tradition of adhering to procedures for peaceful settlement of international disputes have accepted the Court's jurisdiction under Article 36 of the Statute. The Government of Denmark therefore wishes to concentrate its observations first on the question relating to Finland's alleged right of passage for oil rigs, drill ships and reasonably foreseeable ships, secondly on the questions relating to the concepts of "irreparable prejudice" and "urgency" and thirdly on the condition that circumstances require that provisional measures be indicated.

B. The Alleged Right

85. Finland contends that it has an absolute and unconditional right of unimpeded passage through the Danish straits for certain industrial installations and structures up to 170 metres high, designed for the exploration and exploitation of the natural resources of the continental shelf or the subsoil of the high seas.

86. The question which arises is whether, by erecting a tower on the deck of a ship or by building floating industrial units of an extraordinary height, Finland has become entitled to demand a fundamental alteration (and a suspension *pendente lite*) of the current project based on a clearance of 65 metres. This clearance has not been met with any objections by other States and has been applied in similar international straits such as the Bosphorus and certain Japanese straits.

87. A first observation is that Finland is not only invoking an absolute and unconditional right, but also an elastic one, by referring not only to present drill ships and oil rigs, but also to future ships (para. 27 of the Application). Such a claim, if accepted, would grant Finland a permanent right of veto over any installation or bridge which Denmark may consider necessary to build in its territory and across its territorial waters. In effect, the alleged Finnish right would increase in its dimensions so as to correspond to the increased height that any private Finnish company decides to give to the "foreseeable" oil rigs, floating platforms and other structures it might build for oil exploration and exploitation.

Reasonable Considerations

88. Obviously, there cannot be such an absolute and elastic right. The Court is in the presence of a conflict between two rights, neither of which can be absolute: the right of passage through the Danish straits for merchant ships of all States and the equally uncontestable right of Denmark to erect a bridge that will establish a necessary and long-due communication between two of the highly populated islands composing its territory.

89. But here the dispute is not the traditional conflict concerning international straits, between the territorial State and the international community as a whole, interested in the freedom of navigation through straits serving as routes for the bulk of the world's shipping trade.

90. The international community as a whole, by its silence with respect to Denmark's notification has shown itself to be satisfied that the bridge under construction will not interfere with the right of passage of their ships, whatever their flag. It is only Finland which has belatedly questioned the project.

91. And as in every situation of conflict arising from a collision between two claimed rights, the solution has to be founded on a comparison of the claims and a determination of which is the more reasonable one. One test of reasonableness is the fact that the international community has accepted the projected bridge. Another test of reasonableness results from a comparative balancing of the foreseeable damaging effects for the two countries and peoples involved (see paras. 68 - 81 above).

92. Yet another test of reasonableness is the comparison between the social damage that would be inflicted on the population of both countries by giving precedence to one or the other of the claimed rights.

93. From the Finnish Request it follows that since 1972, 18 years ago, "the company has built altogether 23 drill ships, semi-submersible and jack-up oil rigs". Discounting the initial years, the output has been roughly of one drilling unit per year. In the opinion of the Government of Denmark, the possible social damaging effects to Finland, if any, are limited.

94. On the other hand the social repercussions for the Danish population and society which would result from a cancellation or suspension of the Great Belt project would be enormous.

95. The Great Belt is a very significant barrier to traffic between the different parts of the country. The fixed link will reduce transport time between the two parts of Denmark by more than one hour each way and at peak times by much more. That means that both the transport of goods and

business trips can take place within a normal working day. That in itself will mean great savings to Denmark's economy added to which there are the advantages of the possibilities the link offers for a more rational organization of production, transport and storage distribution. The fixed link will also increase the possibility of mobility on the labour market facilitating commuting across the Great Belt.

Legal Considerations

96. In paragraphs 25 and 26 of the Application, the Finnish Government refers to three instruments governing the right of passage in the Danish straits: the 1857 Treaty of Copenhagen on the Abolition of the Sound Dues, the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone and the transit passage régime of the 1982 United Nations Convention on the Law of the Sea.

97. However, the transit passage régime in Part III of the 1982 Law of the Sea Convention is not applicable to the Danish straits because, as will be demonstrated below, these straits have their own treaty regime.

98. At UNCLOS III Denmark and Finland co-sponsored a proposal (A/Conf. 62/C.2/L15) aiming at exempting straits less than six miles wide between the baselines, like the Danish straits, from the regime of transit passage.

99. The negotiations resulted in a general clause of exemption contained in Article 35 of the Convention in Part III under the title "Scope of this Part" which states:

> "Nothing in this Part affects:
>
> (c) the legal régime in straits in which passage is regulated in whole or in part by long-standing international conventions in force specifically relating to such straits"

The 1958 Geneva Convention

100. On the other hand, the 1958 Convention on the Territorial Sea is relevant since both Denmark and Finland have ratified it. But the 1958 Geneva Convention only contains a single provision concerning straits, that in paragraph 4 of Article 16. And this is an incidental provision, forbidding suspension of the right of passage in straits used for international navigation. This prohibition, accepted by Denmark and also a part of customary law, is not relevant to the present dispute.

101. With that exception, the 1958 Convention does not deal directly with passage through straits. This matter is fully governed by the same rules which are applicable to "innocent passage" through the territorial sea. Thus, passage through straits is a derivative and incidental corollary of innocent passage through the territorial sea.

102. While the 1982 Convention on the Law of the Sea proclaims in Article 38 a right of passage through straits as a separate and independent right, there is no equivalent or similar right proclaimed in the 1958 Convention.

103. All there is, is a right of "innocent passage" through the territorial sea, granted by Article 14 of the 1958 Convention to "ships of all States".

The 1857 Treaties and Finland's Position in Respect to them

104. But basically, as it results from Article 35 (c) of the 1982 Convention on the Law of the Sea the Danish straits are governed by two treaties of long standing. These are the Treaty for the Abolition of the Sound Dues between Denmark on the one hand and on the other Austria, Belgium, France, Great Britain, Hanover, The Hansa Towns, Mecklenburg-Schwerin, the Netherlands, Oldenburg, Prussia, Russia and Sweden/Norway, signed at Copenhagen, 14 March 1857, and the separate bilateral treaty between Denmark and the United States, signed at Washington D.C., 11 April 1857.

105. It is to be noticed that Finland is not one of the Parties to these agreements. It may, however, invoke the right of passage granted by the 1857

Treaties, as a third party beneficiary, in accordance with Article 36 of the Vienna Convention on the Law of Treaties. But, as a third party beneficiary Finland cannot claim nor exercise additional or more extensive rights than those enjoyed by the actual parties to the Treaty. The parties to the 1857 Treaties have accepted a clearance of 65 metres as being sufficient for the exercise of their right of passage through the Danish territorial sea. Finland, not a party, cannot legitimately invoke additional rights or a more favourable treatment than the one accepted by the parties to the 1857 Treaties.

106. There cannot be two different measures for the right of passage: an elastic one for Finland, eventually more than 170 metres high, another for the contracting parties, 65 metres high.

Scope of the 1857 Treaties

107. To define the scope of the 1857 Treaties attention must be paid to its object and purpose, according to the rules of interpretation in Article 27(1) of the Vienna Convention on the Law of Treaties.

108. The object of the 1857 Treaty is defined in the treaty itself in the following terms: "la suppression complète et à jamais de tout droit perçu *sur les navires étrangers et leurs cargaisons* à leur passage par le Sund et les Belts".

109. From this definition of the object and purpose of the 1857 Treaties it results that they have in mind "navires marchands", merchant vessels, since the text refers to "navires étrangers et leurs cargaisons". The oil rigs and drill ships are not supposed to transport cargo and consequently can hardly be described as "merchant ships" according to the distinction prevailing at the time between "merchant vessels" and "warships", which were subject to a different regime in accordance with the 1857 Treaties.

110. Professor Brüel, a recognized authority on the régime of straits has stated, in interpreting the 1857 Treaty that:

> "si l'on interprête ainsi le traité selon son object strict, qui est d'abolir une taxe sur le passage des *navires marchands* dont la perception a

> cessé d'etre jugée compatible avec les droits de l'Etat riverain sur un détroit international, il est a présumer que les bâtiments de guerre échappent à ses dispositions" (*Les détroits danois au point de vue du Droit International, Recueil des Cours de l'Académie de Droit International*, Vol. 55, 1936, p. 621).

111. The 1857 Treaty, applicable only to "merchant ships" is even more restrictive than the régime of the 1958 Convention and of course of the 1982 Convention.

112. This difference in the more or less liberal position concerning the passage of ships is no obstacle to the application of the long-standing Convention of 1857, as exempted from Part III of the 1982 Convention (Article 35 (c)).

113. The specialists who have studied the régime of straits under the 1982 Convention coincide in affirming that:

> "if a convention of long-standing exempt by Article 35(c) calls for the application of a more restrictive régime than would be applied under the 1982 Convention, the more restrictive régime would take precedence" (*Prof. H. Caminos, The Legal Régime of Straits in the 1982 United Nations Convention on the Law of the Sea, Recueil des Cours, Hague Academy*, Vol. 205 (1987 V) p. 135).

114. And in almost identical terms it is said by Professor Treves that:

> "si une convention de longue date prévoit dans un détroit un régime plus restrictif de passage que celui qui serait applicable aux termes de la Convention, ce régime reste valable" (*Dupuy et Vignes, Traité du Nouveau Droit de la Mer, T. Treves, La Navigation* p. 793).

115. In conclusion, Denmark accepted in 1857, in response to the interest of the international community in free maritime navigation and trade certain well defined limitations to its sovereign rights.

116. It would not be fair and reasonable to interpret the long-standing commitments assumed in 1857 as imposing upon Denmark a sort of permanent and expanding servitude *"non-edificandi"* over its own territory which would prevent its economic progress and impede the public works required for the well-being of its population.

Customary International Law

117. In paragraphs 25 and 26 of the Application the Finnish Government also refers to international customary law in support of its claim of an absolute and unconditional right of passage through the Danish straits. But no evidence of that contention has been advanced in the Application.

118. Denmark submits that an absolute and unconditional right of passage through the Danish Straits has no foundation in international customary law. No rule of customary law can be invoked which prohibits the building of bridges across international straits as long as existing shipping traffic at the time of the construction is not hampered by the construction.

119. Bridges with clearances similar to that of the East Bridge across the Great Belt have been built across international straits, e.g., in Turkey and Japan.

120. No objections having been voiced against the construction of the bridges across the Turkish and Japanese straits, the *opinio juris* among states must be that contemporary international law on the subject supports the conduct of Turkey, Japan and Denmark.

121. This legal position is further confirmed by the fact that during the Third United Nations Law of the Sea Conference an attempt was made at the early stage of the Conference to have inserted into the future text the following provision: "The coastal State shall not place in the straits any installations which could interfere with or hinder the transit of ships". The proposal was contained in Doc. A/CONF.62/C.2/L.11 of 17 July 1974, Art. 1, 2 (f) sponsored by Bulgaria, Czechoslovakia., German Democratic Republic, Poland, Ukranian Soviet Socialist Republic and Union of Soviet Socialist Republics.

122. The Danish representative stated his opposition to this proposal in an intervention in the 11th meeting of the Second Committee of the Conference on 22 July 1974, cf. the Summary Records of the meeting, Volume II, page 124, paragraph 12, which reads as follows:

> "With reference to document A/CONF.62/C.2/L.11, which stated in article 1, paragraph 2 (f) that the "coastal State shall not place in the straits any installations which could interfere with or hinder the transit of ships", he pointed out that Denmark had geographically the character of an island country, the main island being separated from the other main parts of the country, as well as from neighbouring Sweden, by narrow international straits. It was of vital social end economic importance for Denmark and its neighbouring countries to be able to build bridges or tunnels across those straits, and the Danish Parliament had already taken a decision in principle of that effect. Existing plans took full account of the obligation not to hamper the free passage of ships in transit. His delegation took it that the reference in article 1, paragraph 2 (f) to the placement of installations in straits did not modify the right of coastal States to build traffic links of the nature referred to, on the understanding that transit through the straits would be able to continue unhampered."

123. The views thus expressed were in no way opposed by the Finnish delegation to the Conference or by any other delegation, and the proposal in L. 11 failed to gain the support of the Conference.

C. Irreparable Prejudice and Urgency

124. The question whether the right Finland is seeking in its Application would be irreparably prejudiced or damaged if the Court does not grant the provisional measures requested by Finland should be assessed against the following considerations.

The Element of Urgency

125. It follows from the practice of the International Court of Justice that provisional measures can be applied only if the prejudice to the Applicant's rights is imminent, see e.g., *Nuclear Tests Australia v. France* (*I.C.J. Reports 1973*, p. 104, para. 26, Order of 22 June 1973), *Nuclear Tests New Zealand v. France* (*I.C.J. Reports 1973* p. 140, para. 27, Order of 22 June 1973), and *Trial of Pakistani Prisoners of War* (*I.C.J. Reports 1973*, p. 330, para. 14, Order of 13 July 1973).

126. Finland submits as its primary submission that the Court should indicate to Denmark to "refrain from continuing or otherwise proceeding with such *construction works* in connection with the planned bridge project over the East Channel of the Great Belt as would impede the passage of ships, including drill ships and oil rigs, to and from Finnish ports and shipyards" (Emphasis added). However, no impediment to the passage will be in place before the end of 1994, see paragraph 33 above i.e., at a point when which the present case can be finally decided by the Court.

127. In their secondary submission Finland asks the Court to indicate to Denmark to "refrain from any other action that might prejudice the outcome of the present proceedings". No specific measures are indicated but in paragraph 11 of the Request reference is made to the signing of contracts with regard to the construction of the East Bridge. This question, however, is a matter which cannot in itself prejudice Finland's alleged right to passage of the Great Belt.

128. From Finland's own submissions it thus appears that no prejudice to Finland's alleged right is imminent.

129. The description in paragraphs 43 - 59 above on the passage route through the Sound and the Finnish Mobile Offshore drilling units further reveals that the construction of the East Bridge in the Great Belt hardly represents any practical hindrance for the passing of these units through the Danish straits. Consequently, there exists no urgency justifying the indication of provisional measures.

130. It also seems relevant to raise the following question: Can there be "urgency" after the striking passivity shown by Finland with regard to the present case? Since 1918 Finland has had a diplomatic representation in Copenhagen. It is to be assumed that in the light of the stated interests of Finland in the conditions of passage in and through the Danish straits (Application para. 11 and 12), the Embassy would have been watching carefully developments in Danish politics concerning the plans for establishing a fixed link over the Great Belt - a historic connection of the two main parts of the realm. These developments have been described in paragraphs 11 - 24 above.

131. The silence by Finland through all these years must be interpreted simply as Finnish acquiescence in Denmark's right to construct a high-level bridge across the Great Belt.

132. The real element of urgency arose in 1977 when the Danish Ministry of Foreign Affairs issued its first Circular Note on the Bridge Project. No reaction from Finland was forthcoming although the Finnish Offshore Industry at that time did produce drilling units which would not be able to pass under the bridge fully assambled. The second Circular Note of 1987 explicitly stated that a possibility existed to construct an immersed tunnel instead of the high-level bridge. This was the last call for States having problems for their ships passing the Danish straits to express and explain those problems to the Government of Denmark. As the Circular Note of 30 June 1987 did not give rise to any reaction from States, the Government of Denmark proceeded with the actual planning and implementation of the project as a whole. The Circular Note of 24 October 1989 simply conveyed supplementary information on the actual status of the Great Belt link including the information that it had been decided to construct a high-level bridge of 65 metres over the East Channel. At that time the element of urgency would appear to have been overtaken by events in the sense that it would be almost impossible to stop even this part of the entire project. Nevertheless, it was not until June 1990 that the first representation was made by Finland to the Danish Ministry of Foreign Affairs (see para. 39 above) i.e., at a time when construction works on the current project had been going on for almost two years.

133. In short, it seems fair to state that successive Danish Governments have since the 1970s taken great care when planning the construction of a fixed link over the Great Belt to take into account the existing traffic of ships through that strait. The accredited foreign missions in Copenhagen have been duly informed and notified about the plans. No objections have been raised, but one special request was made by the Soviet Union to increase the clearance from 62 metres to 65 metres. Finland has never before reacted to Denmark's plans and notifications. The Danish Government having acted in good faith all along cannot, therefore, accept to be stopped in the middle of a legitimate enterprise by an objection which is long overdue.

134. How can there be urgency in the light of such a striking passivity by the Applicant? If a State cannot rely upon the reactions of other States, express or tacit, to its diplomatic communications, grave insecurity and instability in international relations would be the consequence. In particular it would seem dangerous to the stability and predictability of relations between States if the Court would use its power under Article 41 of the Statute to declare that longstanding passivity *vis-à-vis* concrete communications on a specific project is no hindrance to issuing a temporary ban on the continuation in whole or in part of that project. Such passivity should not be rewarded but act as an estoppel against furthering the matter.

Reparability of the damage in the present case

135. In reality the present case is about economic expenses on the part of a private Finnish company, and the fact that Finland has not included a demand for compensation in the Request for provisional measures should not be overlooked by the Court. The concept of expenses and compensation is extensively dealt with in paragraphs 18 and 23 in the Application, and in the Submissions Finland reserves *in particular* its right to claim compensation for any damage or loss arising from the bridge project. In paragraph 18 in the Application Finland has estimated the additional cost for constructing the drill ships and oil rigs in a way which ensures passage under the planned bridge to about USD 7.5 - 13.75 million for each construction. In this way Finland has acknowledged that the case is about the cost of manufacturing the drill ships and oil rigs in a different way than now and about the cost of modifying already existing drill ships and oil rigs. The contention in the Request in

paragraph 12 that Finland's losses cannot be offset by compensation is in remarkable contradiction to the Application.

136. Against this background the question of provisional measures emerges in a different light. The Request for provisional measures must now be assessed in such a way as to establish whether the alleged rights infringed by Denmark may be made good by compensation. This test was applied by President Huber of the Permanent Court of International Justice in the case concerning the *Denunciation of the Treaty of November 2nd, 1865, between China and Belgium*. In granting provisional measures President Huber based his decision on the fact that the alleged infraction "could not be made good simply by the payment of an indemnity or by compensation or restitution in some other material form" (*P.C.I.J., Series A, No. 8*, Order of 8 January 1927). In the present case before the International Court of Justice the opposite situation seems to exist.

137. The Government of Denmark thus contends that any possible damage to Finland may be compensated, and no irreparable prejudice or damage as far as Finland is concerned will ensue if the requested provisional measures are not granted. This should in the opinion of the Government of Denmark be given considerable weight when the Court makes its decision on the Request for provisional measures.

138. Furthermore, it should be pointed out that the economic damage that would be caused to Denmark by a suspension of the projected construction of the East Bridge as set out in paragraphs 68 - 81 above would be out of all proportions to the extra cost involved for the company of Rauma-Repola. To grant provisional measures having such a disproportionate effect would not render justice to the Kingdom of Denmark.

D. Circumstances of the Present Case

139. In light of the considerations set out above the circumstances of the present case do not in the view of the Government of Denmark call for any provisional measures to be indicated by the Court.

140. The relevant circumstances may be summarized in the following way:

(1) the *right* for which Finland seeks interim protection does not exist: Mobile Offshore Drilling Units do not enjoy a right of unimpeded passage through the Danish straits eliminating Denmark's right to construct a bridge across these straits within the generally accepted international standards regarding both vertical and horizontal clearances;

(2) no *urgency* exists justifying that provisional measures be indicated: no physical hindrance for the passage through the Great Belt will occur before the end of 1994; even at that time the Finnish Mobile Offshore Drilling Units may pass through the Danish straits either through the Sound or under the bridge with only slight technical modifications; Finnish passivity makes the argument of urgency long overdue;

(3) *irreparable* prejudice does not exist in the present case where all the concerns of the private Finnish company in question can be met by compensation.

PART III

SUBMISSIONS

141. The Government of Denmark requests the Court

(1) To adjudge and declare that, in the light of the law and the facts outlined above, the Request of Finland for an order of provisional measures be rejected.

(2) In the alternative, and in the event that the Court should grant the Request in whole or in part, to indicate that Finland shall undertake to compensate Denmark for any and all losses incurred in complying with such provisional measures, should the Court reject Finland's submissions on the merits.

Copenhagen, 28 June 1991.

(Signed) TYGE LEHMANN

Agent of the Government
of the Kingdom of Denmark

LIST OF MAPS[1]

Map I. Entrances and exits to the Baltic Sea with water depths.
Map II. Territorial sea and internal waters of Denmark.
Map III. Detailed chart of the area in the Great Belt for the construction of the fixed link.

LIST OF ANNEXES[1]

Annex 1. Act No. 414 of 13 June 1973 on the construction of a bridge across the Great Belt.
Annex 2. Circular Note from the Danish Ministry of Foreign Affairs dated 12 May 1977.
Annex 3. Note from the Embassy of the Soviet Union dated 29 March 1978.
Annex 4. Note from the Danish Ministry of Foreign Affairs to the Embassy of the Soviet Union dated 28 June 1978.
Annex 5. Note from the Embassy of Poland dated 6 December 1977.
Annex 6. Note from the Danish Ministry of Foreign Affairs to the Embassy of Poland dated 3 July 1978.
Annex 7. Act No. 380 of 10 June 1987 on the construction of a fixed link across the Great Belt.
Annex 8. Circular Note from the Danish Ministry of Foreign Affairs dated 30 June 1987.
Annex 9. Sketch of the fixed link across the Great Belt.
Annex 10. Report from *Det Norske Veritas* dated 10 March 1989.
Annex 11. Circular Note from the Danish Ministry of Foreign Affairs dated 24 October 1989.
Annex 12. Note from the Embassy of Finland dated 19 June 1990.
Annex 13. Note from the Danish Ministry of Foreign Affairs to the Embassy of Finland dated 11 July 1990.
Annex 14. Note from the Embassy of Finland dated 5 November 1990.
Annex 15. List of Rauma-Repola Offshore Oy's production of mobile offshore drilling units in the period 1974-1990.
Annexe 16. Sales folder from Rauma-Repola Offshore Oy on mobile offshore drilling units.

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[1] Not reproduced. *[Note by the Registry.]*

ORAL ARGUMENTS ON THE REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES

MINUTES OF THE PUBLIC SITTINGS

held at the Peace Palace, The Hague, from 1 to 5 July and on 29 July 1991,
President Sir Robert Jennings, presiding

PLAIDOIRIES RELATIVES À LA DEMANDE EN INDICATION DE MESURES CONSERVATOIRES

PROCÈS-VERBAUX DES AUDIENCES PUBLIQUES

tenues au Palais de la Paix, à La Haye, du 1er au 5 juillet et le 29 juillet 1991,
sous la présidence de sir Robert Jennings, président

CR 91/9

FIRST PUBLIC SITTING (1 VII 91, 10 a.m.)

Present: *President* SIR ROBERT JENNINGS; *Vice-President* ODA; *Judges* LACHS, AGO, SCHWEBEL, BEDJAOUI, NI, EVENSEN, TARASSOV, GUILLAUME, SHAHABUDDEEN, AGUILAR MAWDSLEY, WEERAMANTRY, RANJEVA; *Judges* ad hoc BROMS, FISCHER; *Registrar* VALENCIA-OSPINA.

Also present:

For the Government of Finland:

H.E. Mr. Tom Grönberg, Director General, Legal Department, Ministry of Foreign Affairs, *as Agent*;

Mr. Martti Koskenniemi, Counsellor, Legal Department, Ministry of Foreign Affairs, *as Co-Agent*;

Sir Ian Sinclair,
Professor Tullio Treves, *as Counsel*;

Mr. Tuula Svinhufvud, Attaché, Legal Department, Ministry of Foreign Affairs,
Mr. Kari Hakapää, Associate Professor, University of Lapland,
Mr. Erkki Kourula, Minister Counsellor, The Permanent Mission of Finland in the United Nations, New York,
Mr. Seppo Silvonen, Marketing Director, Rauma-Repola Offshore,
Mr. Aarne Jutila, Professor, Helsinki University of Technology, *as Advisers*.

For the Government of Denmark:

H.E. Mr. Tyge Lehmann, Ambassador, Chief Legal Adviser, Ministry of Foreign Affairs,
Mr. Per Magid, Attorney,
H.E. Mr. Per Fergo, Ambassador, Ministry of Foreign Affairs, *as Agents*;

Dr. Eduardo Jiménez de Aréchaga,
Mr. Derek W. Bowett, C.B.E., Q.C., LL.D., F.B.A., Professor of International Law, Queen's College, University of Cambridge,
Mr. N. J. Gimsing, Professor, Technical University of Denmark, Adviser to A/S Storebaeltsforbindelsen,
Mr. Claus Gulmann, Professor, University of Copenhagen, *as Counsel and Advocates*;

Mr. Kurt Lykstoft Larsen, Acting Head of Planning, Ministry of Transport,
Mr. Søren Strange, Head of Section, Danish Energy Agency,
Mr. Leif Sjøgren, Project Manager, A/S Storebaeltsforbindelsen,
Mrs. Lene Rasmussen, Attorney, A/S Storebaeltsforbindelsen,
Mr. Niels Mogensen, Deputy Head of Division, Danish Maritime Authority,
Mr. Henrik Dhal, Attorney,
Mr. J. R. Lilje-Jensen, Head of Secretariat, Ministry of Foreign Affairs,
Mr. Jakob Høyrup, Head of Section, Ministry of Foreign Affairs, *as Advisers*;

Mrs. Jeanett Probst Osborn, Ministry of Foreign Affairs, *as Secretary*.

OPENING OF THE ORAL PROCEEDINGS

The **PRESIDENT**: The Court meets today, pursuant to Article 74 of the Rules of Court, to hear oral argument on a request made by the Republic of Finland for the indication of provisional measures, under Article 41 of the Statute of the Court, in proceedings instituted by Finland against the Kingdom of Denmark in respect of a dispute concerning passage through the strait known as the Great Belt. Judge Elias, for reasons duly explained to me in accordance with Article 23 of the Statute, will be absent during the hearing and during the determination of this request.

The proceedings to which this request for the indication of interim measures relates were instituted by an Application by Finland in the Registry of the Court on 17 May 1991, referring to a project of the Government of Denmark to construct a fixed traffic connection for both road and rail traffic across the Great Belt, one of the straits connecting the Baltic Sea with the Cattegat and Skagerrak and the North Sea. According to the Application, the effect of the implementation of that project would be to close the Baltic for deep draught vessels requiring over 65 metres of clearance above sea level, and this would put an end to Finnish commercial production and export of oil rigs and drill ships requiring more than 65 metres' clearance. Finland claims that the Great Belt is a strait used for international navigation, that there is a right of free passage through it, which extends to drill ships, oil rigs and possible future designs of ship, and that the construction of the fixed traffic connection as at present planned by Denmark would violate Finland's rights to free passage as established in the relevant conventions and in customary international law.

I request the Registrar to read the submissions of Finland as set out in its Application.

The **REGISTRAR**:

> "The Government of Finland asks the Court to adjudge and declare:
>
> *(a)* that there is a right of free passage through the Great Belt which applies to all ships entering and leaving Finnish ports and shipyards;
> *(b)* that this right extends to drill ships, oil rigs and reasonably foreseeable ships;
> *(c)* that the construction of a fixed bridge over the Great Belt as currently planned by Denmark would be incompatible with the right of passage mentioned in subparagraphs *(a)* and *(b)* above;
> *(d)* that Denmark and Finland should start negotiations, in good faith, on how the right of free passage, as set out in subparagraphs *(a)* to *(c)* above, shall be guaranteed.
>
> Finland reserves its right to modify or to add to the above submissions and in particular its right to claim compensation for any damage or loss arising from the bridge project."

The **PRESIDENT**: On 23 May 1991, Finland filed in the Registry a request for the indication of provisional measures under Article 41 of the Statute of the Court and Article 73 of the Rules of Court. I request the Registrar to read the statement in that request of the measures which Finland requests the Court to indicate.

The REGISTRAR:

> "(1) Denmark should, pending the decision by the Court on the merits of the present case, refrain from continuing or otherwise proceeding with such construction works in connection with the planned bridge project over the East Channel of the Great Belt as would impede the passage of ships, including drill ships and oil rigs, to and from Finnish ports and shipyards; and
>
> (2) Denmark should refrain from any other action that might prejudice the outcome of the present proceedings."

The PRESIDENT: On 28 June 1991, Denmark filed in the Registry written observations upon the request for provisional measures, as contemplated in Article 74, paragraph 3, of the Rules of Court. Those observations will be accessible to the public with effect from the opening of these oral proceedings and I now request the Registrar to read the submissions presented by Denmark in its written observations.

The REGISTRAR:

> "The Government of Denmark requests the Court:
>
> (1) To adjudge and declare that, in the light of the law and the facts outlined above, the Request of Finland for an order of provisional measures be rejected.
>
> (2) In the alternative, and in the event that the Court should grant the Request in whole or part, to indicate that Finland shall undertake to compensate Denmark for any and all losses incurred in complying with such provisional measures, should the Court reject Finland's submissions on the merits."

The PRESIDENT: Since the Court does not include upon the bench a judge of the nationality of either of the Parties, each Party has chosen a judge *ad hoc* to sit in the case. The Government of Finland chose Professor Bengt Henry Gabriel Arne Broms, Professor of International and Constitutional Law in the University of Helsinki, and Judge and Chairman of the First Chamber of the Iran-United States Claims Tribunal. The Government of Denmark chose Dr. Paul Henning Fischer, formerly Permanent Under-Secretary of State for Foreign Affairs of Denmark, Ambassador, and Member of the Permanent Court of Arbitration, who is already sitting as judge *ad hoc* appointed by Denmark in the case concerning *Maritime Delimitation in the Area between Greenland and Jan Mayen*. In accordance with Article 7, paragraph 3, of the Rules of Court, Judge Fischer and Judge Broms take precedence after Members of the Court in that order — the order of seniority of age.

Article 31, paragraph 6 and Article 20 of the Statute require a judge *ad hoc*, before taking up his duties, to make a solemn declaration in open court that he will exercise his powers impartially and conscientiously. I therefore invite the two judges *ad hoc* in this case to make that declaration, the text of which is contained in Article 4 of the Rules of Court. Will all those present please stand whilst those declarations are made.

First Judge Fischer, please.

Judge FISCHER: I solemnly declare that I will perform my duties and exercise my powers as judge honourably, faithfully, impartially and conscientiously.

The PRESIDENT: Judge Broms.

Judge **BROMS**: I solemnly declare that I will perform my duties and exercise my powers as judge honourably, faithfully, impartially and conscientiously.

The **PRESIDENT**: Thank you; please be seated.

I place on record the solemn declarations just made by Judge Fischer and by Judge Broms, and declare them duly installed to sit as judges *ad hoc* in the case concerning *Passage through the Great Belt*.

I note the presence in the Court of the Agents and counsel of the two Parties, and I give the floor to the Agent of Finland, Ambassador Tom Gronberg.

STATEMENT BY MR. GRÖNBERG

AGENT FOR THE GOVERNMENT OF FINLAND

Mr GRONBERG: Mr President, Members of the Court: as you are aware, this is the first time that an agent of Finland has had the occasion to address this Court in a contentious case before it. This is not, of course, due to an absence of interest on Finland's part on the functioning of this body. Quite the contrary. Finland has always supported the Court and stressed its importance as the principal judicial organ of the United Nations. In accordance with the Nordic cultural and political heritage, Finland — as well as Denmark — has traditionally stressed the need to settle international disputes peacefully and in accordance with the rule of law.

Seventy years ago Finland was instrumental in the submission by the Council of the League of Nations of a request for advisory opinion to the predecessor of the present Court. That request related to a matter very different from the present one. As you no doubt recall, the Permanent Court finally decided that giving the requested opinion in the circumstances would have been inappropriate.

The situation in respect of the present case is, of course, entirely different from the circumstances of that early attempt to engage the Court in what was in essence a bilateral dispute. It is a paradox observed by sociologists of law that the stronger the consensus which exists in society, the more recourse is had to litigation in the settlement of disputes over rights. The paradox is, of course, only apparent. The more there is agreement about the basics of social life, the more confidence there is on the legitimacy of courts and the judiciary in general.

Finland and Denmark share a common Nordic background in which the belief in the rule of law is an essential element. Whatever differences of view there might exist on the substance of the present case between the two countries, there should be no disagreement about the appropriateness of using this body in order to put the dispute behind us. Whatever arguments will be put to the Court on the merits of this case, it seems manifestly the case that both Parties have endowed the Court with jurisdiction through their declarations made in the case of Finland on 25 June 1958 and in the case of Denmark on 10 December 1956. In this way, our common adherence to the principles of the *Rechtstaat* and our wish to apply those principles also in our international relations have created the necessary and sufficient conditions for our appearance here today.

Mr President, Members of the Court, let me at this point introduce my colleagues in the Finnish delegation. My Co-Agent, Dr. Martti Koskenniemi; our counsel and advocates Sir Ian Sinclair, Professor Tullio Treves, advisers Professor Aarne Jutila from the Helsinki University of Technology, Associate Professor Kari Hakapää from the University of Lapland, Marketing Director Seppo Silvonen from the Finnish company Rauma-Repola Offshore; attaché Tuula Svinhufvud, Ministry for Foreign Affairs. Later this week, we shall be joined by Minister Counsellor Dr. Erkki Kourula from our Permanent Mission in the United Nations.

In my opening statement on behalf of Finland I intend to set down the general context of the present dispute between Finland and Denmark. To do so, I shall first describe the rights which are the subject of the Finnish Application and, in accordance with Article 41, paragraph 1, of the Court's Statute, also the present request for provisional measures. I shall then make a brief overview of the attempts to settle the matter by negotiations between our two countries and of the conflicting legal points of view which have appeared during those attempts. Finally, I shall say something about the formulation of the Finnish submissions and the request for provisional measures, particularly in light of the interests which Finland seeks to protect by this legal action.

After my statement, I shall ask the floor to be given to our counsel, Sir Ian Sinclair, who will present the legal basis of the Finnish request for provisional measures, particularly in light of the jurisprudence of this Court. A second statement will deal with the factual aspects of the request and will be presented by our Co-Agent, Dr. Martti Koskenniemi.

I come now to my first point, the legal context of the case.

The substantive contentions of Finland will, of course, be the main subject of the later phases of this case. In light of the need to show a correspondence between the rights sought to be preserved and the rights at issue in the main proceedings, as required by the jurisprudence of this Court, it is necessary — as well as useful — to say something here about the rights on which Finland bases its case.

Finland claims that there is a right of free passage through the Danish strait of the Great Belt which applies to all ships entering and leaving Finnish ports and shipyards. This is our main contention. The right of free passage in the Great Belt is, I believe, something on which Finland and Denmark agree.

Throughout the past decades Denmark has consistently maintained the position that the Great Belt strait — which is one of the three Danish straits — is an "international strait" or a "strait used for international navigation" within the meaning of this Court's Judgment in the *Corfu Channel* case.

I need not detain you long to argue that there is a special régime of navigation which exists in international straits. In the case I just mentioned, the Court itself affirmed that there is a customary right of passage of foreign ships through international straits. This position was then adopted by the first United Nations Conference on the Law of the Sea which met in Geneva in 1958. As a result, we now have Article 16(4) of the 1958 Convention on the Territorial Sea and the Contiguous Zone which provides that:

> "There shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State."

The Geneva Convention adopted the conception of "innocent passage" through international straits. It may be noted that that Convention was ratified by Denmark on 26 September 1968 and by Finland on 16 February 1965.

The Third United Nations Conference on the Law of the Sea, as is well known, further strengthened this régime by adopting the notion of "transit passage", written into Articles 37-44 of the 1982 United Nations Convention on the Law of the Sea. Though the Convention is not yet in force, a good case can be made that this notion has already become a part of customary international law. Let me also note that both Denmark and Finland signed the United Nations Convention on 10 December 1982.

The Danish straits, however, are also covered by the special régime established by the Treaty of Copenhagen of 14 March 1857 for the Redemption of the Sound Dues. In that Treaty, 16 parties, among them of course Denmark, agreed *inter alia* that:

> "No vessel shall henceforth, under any pretext whatsoever, be subjected, in its passage of the Sound or Belts, to any detention or hindrance." (Article I, paragraph 1, original French, translation of the Treaty in Churchill-Nordquist, *New Directions in the Law of the Sea*, Vol. IV (1975), pp. 320-324.)

I shall not dwell now more on the differences or overlaps between these various sources of the law regarding the conditions of passage in the Danish straits and in the Great Belt in particular. Suffice it to note that there is a right of free, unhampered passage which applies in the Great Belt and that this right has not been contested by the Danish Government.

For Finland, the right of free passage in the Danish straits is of particular importance because of Finland's geographical location. Finland's coastline extends only in the Baltic. The Danish straits are the only available natural passage-ways between Finnish ports and world oceans. My Co-Agent will give further details on the exceptional dependence of Finland on the conditions of passage in the Danish straits. Let me just note that about 40 per cent of our foreign trade takes place through goods transports utilizing the Danish straits.

As I observed, Denmark has consistently maintained the view that the right of free passage applies in the Danish straits. Thus, for example, in the Danish Note Verbale of 30 June 1987, in which foreign missions in Copenhagen were informed about the Danish plans to construct a fixed link over the Great Belt, it was specifically observed that, in case a bridge solution is chosen:

> "the erection of the bridge section crossing the Eastern Channel will, in conformity with international law, allow for the maintenance of free passage for international shipping between the Kattegat and the Baltic Sea as in the past".

However, in October 1989 it became apparent that the Danish Government had indeed chosen the bridge option and had decided that the main channel of the Great Belt strait — the East Channel — will be closed by a suspension bridge which will be erected in the height of 65 metres.

Mr. President, Members of the Court, Finland's substantive contention is that the construction of the fixed link in the Great Belt in the presently planned form violates the right of free passage established in the various instruments and in customary international law to which I referred a moment ago. Two bridges will close both the two channels of this strait in a way which will permanently prevent the passage of certain categories of ships between the Baltic Sea and world oceans. This is so because the Great Belt contains the only deep-draught passage-way to and from the Baltic. Once the project is finished, deep-draught ships with a height of 65 metres or more no longer can move through the Danish straits.

Suggestions for a fixed link in the Great Belt strait originate quite far back in time. These suggestions received a concrete form first in the late 1950s, then during the 1970s and then again in the late 1980s. The earlier project reached as far as a law on a bridge over the Great Belt, passed in 1973. In May 1977, foreign missions in Copenhagen were informed about the project. Nevertheless, that project met with much internal opposition and the official political agreement to suspend it was taken already the following summer, 1978. As a consequence, the company established to implement the Project was dissolved.

In 1987, the Danish Parliament passed a new law which provided for a bridge or a tunnel alternative to link the two parts of Denmark, Fyn and Jutland in the West and Sjaeland-Lolland in the East, together. In 1989, foreign embassies in

Copenhagen were informed that Denmark's intention was to create a high-level bridge with a clearance of 65 metres in the main navigable channel — the East Channel — of the Great Belt.

Through the incidence of geography, such a project has automatic and permanent consequences for Finland's international traffic connections. It will prevent the passage of very large passenger ships, special ships such as certain of ultra-large oil tankers and heavy lift vessels, as well as most offshore exploration craft, from navigating to and from the Baltic. A large number of such vessels have been constructed in Finnish shipyards and operate between Finnish ports and world oceans.

But the issue is not only about the rights to be applied to the movements of special ships or offshore craft. The problem is much more wide-reaching and has a bearing on the freedom of navigation more generally. For Finland, passage right in the Danish straits is not an abstract, academic question but, because of its geographical position, a highly practical issue of great relevance. Without an unhampered right of passage through the Danish straits, Finland's right to the freedom of the seas becomes restricted in a parallel fashion. In order to be able to enjoy this freedom, Finland first has to enjoy access to the places where it exists — to world oceans. For Finland, the freedom of navigation is just as broad or narrow as the right of passage through the Danish straits.

And here I come to the crux of the matter: is it thinkable that Denmark may restrict the right of free passage in an international strait by a unilateral undertaking such as the present plan for the fixed link in the Great Belt? Is it justifiable that the completion of the project will permanently prevent the passage of craft which have continuously used it since 1972 and which have no other feasible access to and from the Baltic?

The matter is crucial for future Finnish traffic connections generally. Let me note here that the largest passenger ships already produced in Finland and delivered for use outside the Baltic reach a height of 56.3 metres and some of the special ships reach from 62 metres' to 150 metres' height. And the international trend is generally towards even larger ship units. Thus the limit of 65 metres — which is, I may add, anyway a theoretical limit, the operative height being much lower — will become a permanent and arbitrary limit to Finland's capacity to develop such units. It is also an arbitrary way to close such vessels outside the Baltic. That large ships are no science-fiction is, I believe, demonstrated by the fact that even the height of the *Queen Mary* — now removed from active service — was 64.5 metres.

From Finland's perspective, the present Danish project for a fixed link appears as a unilateral attempt to limit a right which has existed in the past and which Finland has also in practice enjoyed. Finland can see no justification in international law for such unilateral action.

Much detailed discussion will undoubtedly be devoted to the development of ship sizes and heights during the latter stages of the proceedings. I need not go into that problem here. Let me conclude this overview of the substance of the right of free passage through the Great Belt, which Finland claims, by noting that the relevant right is not contested between Finland and Denmark. What is contested is its application in the particular circumstances of Finland and in respect of ships to which Finland undertakes that it should extend.

I shall now come to my second point, an overview of the negotiations between our two countries about this matter.

It has been contended sometimes on the Danish side that Finland has reacted too late; and that Finland is already faced with a fait accompli. The bridge project, we have been informed, can no longer be modified. We fail to understand these contentions. If they refer to some of the earlier projects, we can only observe that these projects were contested immediately, as they were proposed, and differed substantially from today's plans. Besides, all Danish contacts with foreign powers in the matter of the Great Belt have consistently contained a reference to the preservation of existing navigation rights in the Great Belt. Surely Finland continues to be entitled to rely on the passage rights which it has publicly used since 1972.

It should also be noted that official notice about the erection of the East Channel bridge arrived at foreign embassies in Copenhagen — including the Finnish Embassy — only on 24 October 1989. At that point, the Finnish concerns had already been officially brought to the attention of the Danish authorities by a letter from the Finnish Embassy of 18 July 1989. The relevant correspondence is included as annexes in our Application and I will here only refer to them.

The Danish written observations argue about acquiescence. This we cannot accept. Is it credible to assume that a Government would give away a right as essential as this and to do this without express notice? May I point out that in the early 1980s the Finnish Government spent about 200 million FIM to dredge a channel 17.5 metres deep to Pori harbour. This was done on the assumption that offshore craft would be continuously built in Pori and that they could use the Great Belt on their way to the North Sea.

Finally, we fail to understand how we could be faced with a fait accompli as no such change in the existing régime has yet materialized. In as far as Finland is aware, the strait remains still open and even the contracts for the construction of the East Channel bridge — the main navigational obstacle — still wait to be concluded. As long as actual construction of the suspension bridge has not yet commenced, all modifications are possible.

Finland and Denmark have gone through several rounds of bilateral discussions on how to safeguard the right of free passage in the Great Belt while taking account of the justified needs of Denmark to improve its internal traffic connections. I already noted the letter from the Finnish Embassy to the Danish Board of Navigation of July 1989. The matter was thereafter taken up in consultations between the Secretaries of State, Mr. Wihtol of Finland and Mr. Möller of Denmark, in Helsinki on 20 September 1989. At that meeting, Mr. Wihtol specifically repeated the Finnish concern about free passage in the Great Belt and the difficulties that some of the existing alternatives might cause to Finland.

Nevertheless, in October 1989 we were informed about the Danish choice of the bridge alternative with a navigational clearance of 65 metres.

May I here add that the Danish review of the history of the contacts as described in paragraph 38 of the written observations is slightly misleading.

The matter was then included in the agenda of the regular bilateral consultations on trade policy between the representatives of the foreign ministries of our two countries which were held in Copenhagen on 5 February 1990. At this meeting, it was for the first time argued from the Danish side that the right of free passage does not apply to the kinds of offshore craft produced in Finland because it applies only to regular "ships".

Legal experts of both countries met at the legal department of the Danish Ministry for Foreign Affairs on 15 May 1990. Again, the Danes repeated the view that the project was intended to guarantee the right of free passage of all existing ships — and that this excluded the offshore craft produced in Finland. Besides, we were told, we had anyway reacted too late.

On 19 June 1990 a Note Verbale from the Finnish Embassy in Copenhagen to the Danish Foreign Ministry explicitly repeated the Finnish points of view and suggested negotiations on how to guarantee the right of free passage in the

Great Belt. The Danish Ministry of Foreign Affairs replied on 11 July 1990 that the bridge project fulfils the requirements of international law and that there is therefore no basis for negotiations. Technical consultations were, however, suggested. These consultations took place in Copenhagen on 30 August 1990. The Finnish participants were told that no review of the project is possible. In a Finnish note of 7 September it was suggested that further discussions would also include the legal aspects of the problem — this suggestion was, however, rejected on the Danish side.

At the following meeting, which took place in Copenhagen on 17 October last year, many practical suggestions were made by Finland on how to modify the present project so as to guarantee the right of free passage. All suggestions were rejected. The Danish side relied heavily on the legal view that the Finnish craft — oil rigs and drill ships — did not enjoy a right of passage and that anyway Finland had no say in the matter. These views were repeated at our next meeting in Copenhagen on 23 January 1991.

Finally, in February 1991 Finland's Prime Minister, Mr. Harri Holkeri, asked his Danish colleague that negotiations should start on how to accommodate the Finnish rights in the project. Denmark's Prime Minister, Mr. Poul Schlüter replied — the text of this correspondence is annexed to the Finnish Application — that there was no possibility to modify the project at this advanced stage and that Finland had anyway reacted too late. Reference was here made to a previous but different and aborted project from the 1970s.

At that point, it was decided that the only way to safeguard Finnish rights would be to turn to this body — an eventuality foreseen in the Finnish Prime Minister's letter to his Danish counterpart. As the bridge project had steadily advanced during the year and a half of continued contacts, it was considered necessary to file a request for provisional measures so as to prevent Finland from being faced with a real fait accompli in the form of a finished or a very advanced project — and, of course, to avoid the risk to Denmark that additional costs would be involved in tearing down buildings already erected.

In conclusion, I can only note that Finland has tried its best to reach settlement in this matter by bilateral contacts. During our very frequent meetings, however, the Danish side has not moved an inch to seek an accommodation. Instead of showing comprehension for the Finnish rights and interests, our legal views have been flatly rejected — indeed, we were told that we did not enjoy the passage right because the craft we are referring to were not "ships" and that we had anyway consented to the limitation of our rights in connection with a previous project initiated in 1977 and suspended by a decision of the Danish Parliament the following year.

Mr. President, Members of the Court, we were not impressed by the Danish points of view. Throughout our bilateral contacts we had the feeling that whatever points of view we would put forward would not have any effect on the Danish side. We know that the project has been and continues to be subject to heated political debate in Denmark. We can understand that government officials do not easily give in to external pressure which might endanger the very fragile political consensus which supports the present bridge plan in Denmark. But we could not understand the Danish insistence about our having no right in the matter — about our having somehow conceded to Denmark that it can limit our rights by unilateral action.

Before I finish, let me briefly comment on what it is that we are today requesting from the Court.

Neither our Application nor the request is intended to achieve a complete cessation or blanket prohibition of construction works for the fixed link project. We have much sympathy towards the Danish effort to improve Denmark's internal traffic connections by building this traffic link. What we want to achieve is a modification of the project so that the right of free passage can continue unviolated in the Danish straits.

Up to this day, the Danes have been unwilling even to discuss any modification. In Finland, we have drawn the conclusion that this discussion can be conducted fruitfully only after we possess an authoritative statement on what our respective rights in this matter are. This is what we have come to seek from the Court. We seek, first, a declaration of our rights in this matter. On the basis of that declaration, we then aim to attain negotiations on the different technical alternatives which might be used to safeguard our rights while taking account of the legitimate needs of Denmark.

A final point. Much technical detail will undoubtedly be presented in these proceedings. It is of essence to note, however, that nearly all of the technical and economic aspects of this case are subject of dispute among experts. And this is not a division of opinion following strictly national boundaries. Danish experts disagree among themselves just as fully and perhaps much more fiercely on the technical and economic aspects of the different alternatives as they do with Finnish experts. There is a group of internationally renowned technical experts in Denmark — university professors of bridge and tunnel building — who have gone so far as to believe that the bridge alternative is so much worse than the tunnel alternative — from a purely national point of view — that they have complained about the matter to the Danish Parliamentary Ombudsman claiming that the bridge decision simply failed to take account of the data supporting the tunnel alternative.

While it is clear that the case cannot be fully grasped without some understanding of the technical and economic complexities, these data cannot be decisive in regard to the parties' rights.

From Finland's perspective, the present dispute is not about which technical or economic data are correct and which experts we should believe but about what are the two countries' rights in regard to free passage in the Great Belt strait. Pending a declaration of those rights, we now seek an interim order to the effect that the rights we are claiming in the main proceedings are not prejudiced by continuous Danish activity. That we believe we do have grounds for such an interim order will, with your permission, Mr. President, Members of the Court, and unless you have any questions to me, now be explained by our distinguished counsel, Sir Ian Sinclair. Thank you.

ARGUMENT OF SIR IAN SINCLAIR

COUNSEL FOR THE GOVERNMENT OF FINLAND

Sir Ian SINCLAIR : Mr. President, Members of the Court, it is a great honour for me to appear in these oral proceedings on behalf of Finland on the Finnish request for provisional measures in the present case. As this is the first occasion on which I have been privileged to address the Court, I would like to emphasize the esteem and respect in which I, together with the overwhelming majority of international lawyers of my generation, hold the Court as the principal judicial organ of the United Nations. I do so the more willingly and indeed, the more ardently, because I have to begin my statement with an apology to the Court and also to our opponents. It so happens that, for over a year, the oral hearing in the *Heathrow User Charges Arbitration*, in which I am engaged as one of the counsel for the United Kingdom Government, has been fixed to open in this very building on 2 July, that is to say tomorrow. Accordingly, I must make my most sincere apologies to the Court and indeed to our opponents that I will regrettably be unable to participate in the proceedings before this Court during the course of tomorrow because of this conflicting commitment. I hope, and indeed intend, to be present during the course of the further oral hearings in this case later this week but I would ask the Court, and indeed our opponents, to excuse my absence — my inevitable and, I trust, understandable absence — from this courtroom tomorrow.

As Ambassador Grönberg has indicated, my task this morning is to analyse the legal basis for an indication of provisional measures by the Court and to demonstrate how the Finnish request for such an indication, duly filed with the Court on 23 May this year, falls squarely within the framework of the principles already established in the jurisprudence of the Court for the grant of provisional measures.

Mr. President, Members of the Court, you will of course be aware of the terms of Article 41, paragraph 1, of the Statute of the Court which says :

> "The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party."

It is clear that Article 41 of the Statute confers upon the Court a *discretion* to grant or not to grant provisional measures of protection ; but it is a discretion which must be exercised judicially, having regard to the object and purpose of an indication of provisional measures — namely, "to preserve the respective rights of either party". As one recent commentator has observed :

> "That the powers of the Court under Article 41 are *discretionary* is a banal truth. The character of grants of interim protection is inherent in their dependence on the circumstances of a given case and in the necessity of their assessment *ad hoc* ; it is reflected in the actual language of Article 41 ('if it [the Court] considers that circumstances so require') and of corresponding provisions related to other judicial bodies. However, it may be appropriate to recall that 'discretionary power' is not an 'arbitrary power'." (Sztucki, *Interim Measures in the Hague Court* (1983), p. 61.)

Finland sees no need to enter into the disputed question of whether the Court has an *inherent* power to grant provisional measures of protection, quite apart from the terms of Article 41 of the Statute, read in conjunction with Articles 73 to 78 of the 1978 Rules of Court. Finland is of course aware of the view expressed by the late and distinguished Judge Fitzmaurice in his separate opinion in the *Northern Cameroons* case, where, in speaking of the Court's preliminary or "incidental" jurisdiction (for example, to decree interim measures of protection), he states:

> "Although much (though not all) of this incidental jurisdiction is specifically provided for in the Court's Statute, or in Rules of Court which the Statute empowers the Court to make, it is really an inherent jurisdiction, the power to exercise which is a necessary condition of the Court — or of any court of law — being able to function at all." (*I.C.J. Reports 1963*, p. 103.)

Whatever may be the truth of this observation, Finland is content to base its request for an indication of provisional measures in the present case on the precise terms of Article 41 of the Statute, believing, as it does, that its request falls squarely within the scope of that Article.

The object and purpose of an indication of provisional measures under Article 41 of the Statute being "to preserve the respective rights of either party" in the main proceedings, there must obviously be a link between the provisional measures sought and the rights which are or will be disputed on the merits. The "respective rights" are those which either party is likely to advance in the main proceedings on the merits and on which the Court is being called upon to adjudicate. This is confirmed by a passage from the Order of the Court of 5 July 1951 on the United Kingdom request for provisional measures in the *Anglo-Iranian Oil Co.* case, where the Court stated:

> "Whereas the object of interim measures of protection provided for in the Statute is to preserve the respective rights of the Parties pending the decision of the Court, and whereas from the general terms of Article 41 of the Statute and from the power recognized by Article 61, paragraph 6, of the Rules of Court [that was of course the numbering of the Article of the Rules of Court then in force], to indicate interim measures *proprio motu*, it follows that the Court must be concerned to preserve by such measures *the rights which may be subsequently adjudged by the Court to belong either to the Applicant or to the Respondent*." (*I.C.J. Reports 1951*, p. 93; emphasis added.)

It is also confirmed by the Order of the Court of 11 September 1976, on the Greek request for provisional measures in the *Aegean Sea* case; paragraph 25 of that Order states *inter alia* that the power of the Court to indicate interim measures under Article 41 of the Statute:

> "presupposes that irreparable prejudice should not be caused to *rights which are the subject of the dispute in judicial proceedings*. . ." (*I.C.J. Reports 1976*, p. 9; emphasis added).

Further confirmation is provided by the Order of the Court of 15 December 1979, on the United States request for provisional measures in the case of the *United States Diplomatic and Consular Staff in Tehran*. Paragraph 36 of that Order, after recalling that the power of the Court to indicate provisional measures has as its object to preserve the respective rights of the parties pending the decision of the Court, repeats the language just cited from the Order of the Court in the *Aegean Sea* case.

Again, in paragraph 24 of its recent Order of 2 March 1990, on the Guinea-Bissau request for provisional measures in the case between Guinea-

Bissau and Senegal concerning the *Arbitral Award of 31 July 1989*, the Court has re-emphasized that the purpose of exercising the power conferred upon it by Article 41 of its Statute is "to protect rights which are the subject of dispute in judicial proceedings".

This necessity for a link between the provisional measures sought and the subject-matter of the Application has been stressed by the Court in other cases. Thus, in paragraph 14 of its identical Orders on the United Kingdom and Federal Republic of Germany requests for provisional measures in the *Fisheries Jurisdiction* case, the Court pointed out that:

> "the contention of the Applicant that its fishing vessels are entitled to continue fishing within the above-mentioned zone of 50 nautical miles is part of the subject-matter of the dispute submitted to the Court, and the request for provisional measures designed to protect such rights is therefore directly connected with the Application" (*I.C.J. Reports 1972*, pp. 15 and 33).

Similarly in its Orders indicating provisional measures in the *Nuclear Tests* cases, the Court stated that it was:

> "satisfied that it should indicate interim measures of protection in order to preserve the right claimed by Australia [New Zealand, as the case may be] in the present litigation in respect of the deposit of radio-active fall-out on her territory" (*I.C.J. Reports 1973*, pp. 105, para. 30, and 141, para. 31).

Thus, it is an accepted feature of the Court's jurisprudence on the exercise of its powers under Article 41 of the Statute that there must be a correspondence between the rights sought to be preserved and the rights which are in dispute between the parties.

Finland submits that this condition is fully met in the present case. The right which Finland seeks to preserve by conservatory measures, pending a decision of the Court on the merits of Finland's Application, is the continued right of free passage through the Great Belt for ships, including drill ships and oil rigs, proceeding to and from Finnish ports and shipyards. This is a right which corresponds closely to the relief sought in Finland's Application filed with the Court on 17 May. In particular, Finland's Application requests the Court to adjudge and declare *inter alia* that there is a right of free passage through the Great Belt which applies to all ships entering and leaving Finnish ports and shipyards; that this right extends to drill ships, oil rigs and reasonably foreseeable ships; and that the construction of a fixed bridge over the Great Belt, as currently planned by Denmark, would be incompatible with the right of passage so defined. The requirement of a correspondence between the rights sought to be preserved and the rights which are in dispute between the Parties is thus, in Finland's submission, fully satisfied in the present case.

That this is an important requirement is illustrated by the fact that the Court has, on occasion, declined to indicate provisional measures for lack of a correspondence between the rights sought to be preserved and the rights at issue in the main proceedings. Already in the *Polish Agrarian Reform* case, the Permanent Court rejected a German request for an indication of provisional measures on this ground — that is to say the incompatibility between the main claim and the request for interim protection. And I cite a short passage from the Order of the Permanent Court in that particular case:

> "whilst the suit brought by the German Government is presented as having for its object to obtain a declaration . . . that . . . infractions *have been* committed . . . the request for interim protection covers *all the future cases* of

> the application of the Polish agrarian reform law to the Polish nationals of German race . . . ; accordingly, the interim measures asked for would result in a general suspension of the agrarian reform in so far as concerns Polish nationals of German race, and cannot therefore be regarded as solely designed to protect the subject of the dispute and the actual object of the principal claims . . ." (*P.C.I.J., Series A/B, No. 58*, p. 177).

More recently, in the *Aegean Sea* case, Greece invoked, among its rights to be protected, the right of Greece to the performance by Turkey of its undertakings contained in Article 2, paragraph 4, and Article 33 of the Charter of the United Nations and in Article 33 of the General Act of 1928. However, the Court found that: "the right so invoked is not the subject of any of the several claims submitted to the Court by Greece in its Application" and that, consequently: "this request does not fall within the provision of Article 41" (*I.C.J. Reports 1976*, p. 11, para. 34).

Again, in the even more recent case between Guinea-Bissau and Senegal concerning the *Arbitral Award of 31 July 1989*, the Guinea-Bissau request for an indication of provisional measures was denied by the Court, principally on this ground. The Court will recall that, in this case, Guinea-Bissau is requesting the Court to declare that the Award of the Arbitral Tribunal of 31 July 1989, in connection with the delimitation of the maritime territories of the two States, is "inexistent" for one reason and, subsidiarily, that it is "null and void" for another reason. The provisional measure sought was, however, that the Parties should abstain in the disputed area of maritime territory from any act or action of any kind whatever. In denying the request for this provisional measure, the Court stated, in paragraph 26 of its Order of 2 March 1990:

> "Whereas the Application instituting proceedings asks the Court to declare the 1989 Award to be 'inexistent' or, subsidiarily, 'null and void', and to declare that 'the Government of Senegal is thus not justified in seeking to require the Government of Guinea-Bissau to apply the so-called Award of 31 July 1989'; whereas the Application thus asks the Court to pass upon the existence and validity of the Award but does not ask the Court to pass upon the respective rights of the Parties in the maritime areas in question; whereas accordingly, *the rights sought to be made the subject of provisional measures are not the subject of the proceedings before the Court on the merits of the case*; and whereas any such measures could not be subsumed by the Court's judgment on the merits." (Emphasis added.)

It will be apparent to the Court that none of the reasons advanced for denying provisional measures in these three cases which I have discussed (the *Polish Agrarian Reform* case, the *Aegean Sea* case and the case concerning the *Arbitral Award of 31 July 1989*, between Guinea-Bissau and Senegal) is applicable in the present case. The right sought to be protected by Finland, by means of the conservatory measures requested is the right which is the principal subject of the proceedings before the Court on the merits of the case.

Of course, objection has sometimes been taken to the grant of provisional measures on the ground that there is too *close* a correspondence between the relief sought by way of conservatory measures under Article 41 of the Statute and the relief being sought by the Applicant in the proceedings on the merits. This objection takes the form of a claim that what the Applicant is in effect seeking by way of provisional measures in cases such as this is an interim judgment in its favour on the merits. The point first arose before the Permanent Court in the *Chorzów Factory* case where Germany put forward a request that the Court indicate an advance payment of a certain sum (presented as being beyond controversy) in partial satisfaction of the principal claim for reparation. The Court rejected this request on the ground that it could not

> "be regarded as relating to the indication of measures of interim protection, but as designed to obtain an interim judgment in favour of a part of the claim formulated in the Application"

and it was accordingly "not covered by the terms of the provisions of the Statute and Rules cited therein" (*P.C.I.J., Series A, No. 8*, p. 10).

I would ask the Court, however, to note that the object and purpose of the German request in the *Chorzów Factory* case was not to conserve German rights which were at risk during the course of the proceedings, but rather to obtain satisfaction in advance of part of its principal claim. Moreover, the principal claim itself was a pecuniary claim for reparation. As Sztucki observes :

> "The dispute was about the amount of pecuniary compensation and unless the unusual question of a State's solvency arises, pecuniary claims probably do not qualify as a matter of principle for interim protection in inter-State litigation." (Sztucki, *op. cit.*, p. 93.)

Nevertheless, reliance has been placed upon the above-cited *dictum* from the Order of the Permanent Court in the *Chorzów Factory* case to sustain a more general proposition that when there is exact correspondence between the principal relief sought by an applicant State on the merits of the case and the principal relief sought by the applicant State in a request for provisional measures, the request must be regarded as one for an interim judgment and should therefore be refused. This general proposition does not of course sit all that well or tidily with the requirement we have already discussed and which is so clearly fixed in the jurisprudence of the Court, namely that there should be a close link between the rights sought to be protected by conservatory measures under Article 41 of the Statute and the rights at issue in the proceedings on the merits. Nor is it indeed supported by the jurisprudence of the Court, as I hope I will be able to demonstrate.

Let us take first the *Nuclear Tests* case. In its Application against France in this case, Australia asked the Court *inter alia* : "to order that the French Republic should not carry out any further such tests", that is to say : "atmospheric nuclear weapons tests in the South Pacific Ocean".

In its request for provisional measures, Australia asked the Court to indicate by way of a provisional measure :

> "that the French Government should desist from any further atmospheric nuclear tests pending the judgment of the Court in this case" (*I.C.J. Pleadings, Nuclear Tests*, Vol. I, p. 57).

Thus, there was virtually exact correspondence between the relief sought by Australia in the main proceedings and in the request for provisional measures.

This coincidence of submissions was not commented upon by the Parties. Nor was it referred to in the text of the Court's Orders of 22 June 1973 indicating provisional measures in this case and also in the parallel case instituted by New Zealand against France. However, two of the Judges of the Court based their dissenting opinions on these orders partly on the ground of the coincidence of submissions. Thus, Judge Forster, in his dissenting opinion, stated :

> "The interim measures requested by Australia are so close to the actual subject-matter of the case that they are practically indistinguishable there-

> from. Ultimately the only alternatives are the continuation or the cessation of the French nuclear tests in the Pacific. This is the substance of the cases, upon which, in my opinion, it was not proper to pass by means of a provisional Order, but only by a final judgment." (*I.C.J. Reports 1973*, p. 113.)

Judge Gros, in his dissenting opinion, after having referred to the motives of the Order of the Permanent Court in the *Chorzów Factory* case, likewise affirmed that a comparison between Australia's principal claim and its request for provisional measures: "shows that the latter was indeed designed to obtain an interim judgment" (*I.C.J. Reports 1973*, p. 123).

The same point arises, though in a much more muted form, in the case of *United States Diplomatic and Consular Staff in Tehran*. Here there was a coincidence with one of the five main submissions in the United States Application — namely, in relation to the release of all United States hostages detained in Tehran and the safe departure from Iran of all such persons and of other United States nationals in Tehran. In its written observations on the United States request for provisional measures in this case, Iran had submitted *inter alia* and I quote from Iran's written observations:

> "With regard to the request for provisional measures, as formulated by the United States, it in fact implies that the Court should have passed judgment on the actual substance of the case submitted to it." (*I.C.J. Reports 1979*, p. 11.)

The issue having been raised by one of the parties, the Court felt bound to pronounce on it. In the Court's Order on provisional measures of 14 December 1979, reference was again made to the Order of the Permanent Court in the *Chorzów Factory* case. The Court then stated that:

> "the circumstances of that case were entirely different from those of the present one, and the request there sought to obtain from the Court a final judgment on a part of a claim for a sum of money; . . . moreover, a request for provisional measures must by its very nature relate to the substance of the case since, as Article 41 expressly states, their object is to preserve the respective rights of either party; and . . . in the present case the purpose of the United States request appears to be not to obtain a judgment, interim or final, on the merits of its claim but to preserve the substance of the rights which it claims *pendente lite*" (*I.C.J. Reports 1979*, p. 16, para. 28).

The Court will of course be aware that its Order of 15 December 1979 in that particular case was adopted unanimously. Thus, the doubts expressed by the dissenting Judges on the Order indicating provisional measures in the *Nuclear Tests* case, based on the assertion that the requests for provisional measures were in substance requests for an interim judgment, appear to have been, at least to some extent, dissipated. As Sztucki comments:

> "In the *US Staff* case, the Court seems to have reaffirmed for the second time (for the first time in the *Nuclear Tests* cases) the view that the substantive coincidence of submissions in the request and in the application does not *per se* transform a request into one for interim judgment; and consequently does not preclude action under — and in conformity with — Article 41." (Sztucki, *op. cit.*, p. 96.)

It is highly relevant in this context that the Court, in its Orders indicating provisional measures in the *Fisheries Jurisdiction* cases, for the first time included a general "without prejudice" clause covering also questions arising on the merits.

The Court expressly stated in those Orders (and this is a fairly common pattern of a paragraph included in Orders on provisional measures):

> "the decision given in the course of the present proceedings *in no way prejudices* the question of the jurisdiction of the Court to deal with the merits of the case or *any question relating to the merits themselves* and leaves unaffected the right of the Respondent to raise arguments against such jurisdiction or in respect of such merits" (*I.C.J. Reports 1972*, pp. 16 and 34 respectively, para. 20).

A generalized "without prejudice" clause of this nature has also been included in the Court's Orders on provisional measures in the subsequent *Nuclear Tests* case, the *Aegean Sea* case, the *United States Diplomatic and Consular Staff in Tehran* case and the *Military and Paramilitary Activities in and against Nicaragua* case.

It is clear that the object and purpose of this generalized "without prejudice" clause is to reassure the Respondent (and indeed the world at large) that the Court, in making an order indicating provisional measures, is not encroaching upon any issue of contested jurisdiction nor indeed upon any disputed question relating to the merits of the case. But I suggest it does more than that: it also reflects the fact that the Court, even if it has given an indication of provisional measures, is open to opposite arguments at later stages of the case, whether on jurisdiction or on the merits. It will of course be recalled that, in the *Anglo-Iranian Oil Co.* case, the Court eventually declared that it lacked substantive jurisdiction after having earlier indicated provisional measures in the case.

The Court adjourned from 11.20 to 11.40 a.m.

Mr. President, Members of the Court, just before the interval I had been discussing the "without prejudice" clause included within the framework of recent Orders of the Court on interim measures of protection. I did so within the framework of a wider survey of various aspects affecting the object and purpose of interim measures of protection.

Indeed, I really make no apology for having analysed in some detail this aspect of the Court's jurisprudence on provisional measures; I have to anticipate that our opponents may contend that, in the present case, Finland is in substance requesting, by way of provisional measures, an interim judgment in its favour on the merits of the case. This is most decidedly not the case, if only for two reasons:

(1) the object of Finland's request for provisional measures is to *preserve* Finnish rights or Finnish claimed rights, pending a decision by the Court on the merits; and

(2) although there is some correspondence between the Finnish request and the relief sought in the Finnish Application, there is no exact correspondence.

If I may elaborate on the first of these reasons, it is clear from the materials which Finland has presented to the Court in its Application that, since 1972, Finland has enjoyed the right of free passage through the Great Belt of drill ships and oil rigs (including semi-submersible rigs and jack-up rigs) manufactured in Finnish shipyards. Finland is simply seeking to have that right preserved pending a decision by the Court on the merits of the case. In this particular respect, therefore, the position in the present case is comparable to that in the *United States Diplomatic and Consular Staff in Tehran* case where the Court found that the object of the United States request was "to preserve the substance of the rights which it claims *pendente lite*". It is a truly *conser-*

vatory measure which Finland requests, a measure justified by the imminent threat to Finnish rights and interests which construction by Denmark of the Great Belt bridge in its presently planned form presents. Finland simply seeks to preserve the status quo as regards free passage through the Great Belt pending the Court's decision on the merits of the case. In no sense can the Finnish request be interpreted as a request for an interim judgment on the merits. Sztucki, writing in 1983 and taking into account the materials available to him as at 31 May 1981, points out that the problem under consideration has substantive aspects :

> "Even a superficial look at cases in which interim protection was granted will reveal its true meaning. The substance of all these cases (i.e., those of the *Sino-Belgian Treaty, Electricity Company, Anglo/Iranian Oil Company, Fisheries Jurisdiction*, and also *US Staff*) was that the respective applicants relied on recognized legal status of more or less long standing ; and sought judicial relief against the respective respondents who unilaterally attempted to alter or violate that status to the detriment of the applicants." (Sztucki, *op. cit.*, p. 99.)

And Sztucki continues :

> "When the Court, in such situations, grants interim protection and indicates that the applicants should provisionally, pending the final judgments, enjoy certain rights they claim to possess, the indication is not to be viewed as *anticipatory* of the existence of 'questionable rights', which are 'presumed to exist by the mere fact of indicating provisional measures to protect them', but rather as *conservatory* of a previously recognized status which became the object of a litigation. The substantive rights in dispute still [to quote from the Court's Order on provisional measures in the *Anglo/Iranian Oil Company* case] 'may be subsequently adjudged by the Court to belong either to the Applicant or to the Respondent'. This is in strict conformity with the nature of interim measures as a means of provisionally upholding or restoring the *status quo*." (Sztucki, *ibid.*)

This is precisely the position in which Finland finds itself at the present stage of these proceedings. Finland is threatened with action by Denmark which would irretrievably cut off access to and from the North Sea for drill ships and oil rigs manufactured in Finnish shipyards. Finland simply seeks to have the existing right of free passage through the Great Belt for those drill ships and oil rigs preserved *pendente lite*.

I need not detain the Court long in elaborating on the second reason which I have presented, because it is, in a sense, of a subsidiary nature. As I have already indicated, there is no *exact* correspondence between the Finnish request and the relief sought in the Finnish Application. Finland has sought to confine its request to the minimum necessary to protect Finnish rights and interests. In the first place, although Finland, in its Application, submits that the right of free passage extends to drill ships, oil rigs and *reasonably foreseeable* ships, the request is confined to drillships and oil rigs. In the second place (and perhaps this is even more important), the Finish request is limited to seeking an indication that Denmark should, pending a decision on the merits,

> "refrain from continuing or otherwise proceeding with *such construction works* in connection with the planned bridge project over the East Channel of the Great Belt *as would impede the passage of ships, including drillships and oil rigs, to and from Finnish ports and shipyards*" (emphasis supplied).

Finland is *not* seeking a blanket prohibition of all activity by Denmark in connection with the bridge project. A blanket prohibition could be considered as unreasonable and as going beyond what is strictly needed by way of protective and conservatory measures. Finland has accordingly sought to restrict its request to the bare essentials of what is urgently required to protect Finnish rights and interests in this case pending a decision on the merits.

I have so far confined myself to analysing the object and purpose of Finland's request for provisional measures in the light of the requirement in Article 41 of the Statute that the aim of provisional measures should be to "preserve the respective rights of either party". I have sought to do so by drawing upon the jurisprudence of the Court regarding the relationship between a request for provisional measures and a final judgment on the merits.

I have also sought to do so by demonstrating that the Finnish request is in no sense a request for an interim judgment but is strictly conditioned by the perceived need to preserve the status quo until the Court has ruled on the merits of the rights claimed by Finland and Denmark respectively. Finland submits that, on this aspect of the matter, it has fully demonstrated that Finland seeks only *conservatory* measures which it is entirely within the discretion of the Court to grant in pursuance of Article 41 of the Statute.

The second part of my address is accordingly confined to an analysis of the phrase "if the Court considers that circumstances so require" which is the remaining condition in Article 41 of the Statute requiring to be satisfied. Here again, the jurisprudence of the Court furnishes clear guidelines as to the meaning of this phrase. I propose to consider these guidelines under three headings:

(1) the requirement of "irreparable prejudice";
(2) the requirement of "urgency"; and
(3) the prospects of substantive jurisdiction.

IRREPARABLE PREJUDICE

It has been a consistent feature of the jurisprudence of the Court (and indeed of the Permanent Court) that, before granting provisional measures, the Court must be satisfied that *irreparable prejudice* will or is likely to be caused to rights at issue in the proceedings on the merits if relief by way of interim protection is not accorded.

The first issue to be considered in this context is whether the requesting State must satisfy the Court that irreparable prejudice *has* already been caused or *will inevitably* be caused in the near future to the rights and interests of the requesting State as a result of acts or omissions of the respondent State. The jurisprudence of the Court (and indeed of the Permanent Court) reveals that a *probability* or a *possibility* of irreparable prejudice is regarded as sufficient to justify the Court in indicating provisional measures in accordance with Article 41 of the Statue. Thus, in the very first case in which the Permanent Court indicated provisional measures — the *Sino-Belgian Treaty case* — the order issued *ex parte* by the President of the Permanent Court on 8 January 1927, indicated such measures against:

> "the event of infraction — a contingency rendered possible by the situation resulting from the publication of the . . . Chinese Presidential Order — of certain of the rights which Belgium or her nationals would possess in China if the Treaty of 2 November 1865 were recognized as still operative" (*P.C.I.J., Series A, No. 8*, p. 7).

Similarly, in the *Nuclear Tests* cases, the present Court was satisfied that it should indicate interim measures of protection against the possiblility of damage:

> "for the purposes of the present proceedings it suffices to observe that the information submitted to the Court *does not exclude the possibility* that damage to Australia might be shown to be caused by the deposit of radio-active fall-out resulting from such tests and to be irreparable" (*I.C.J. Reports 1973*, pp. 105, para. 29, and 141, para. 30).

In the order on provisional measures in the case of *United States Diplomatic and Consular Staff*, the Court contented itself with determining that:

> "the continuance of the situation the subject of the present request exposes the human beings concerned . . . to a *serious possibility of irreparable harm*" (*I.C.J. Reports 1979*, p. 20, para. 42).

On one occasion, in the *Fisheries Jurisdiction* cases, the Court might be thought to have suggested a slightly more stringent test by observing that:

> "the immediate implementation by Iceland of its Regulations *would*, by anticipating the Court's judgment, prejudice the rights claimed by the United Kingdom" (*I.C.J. Reports 1972*, pp. 16, para. 22, and 34, para. 23).

It may be doubted, however, whether the Court did adopt a more stringent test in the *Fisheries Jurisdiction* cases — it was simply noting as a fact that immediate implementation of the Icelandic Regulations would entail the stated consequences, without insisting that certainty as to irreparable prejudice was a precondition for the grant of provisional measures.

In the present case, it may be noted that completion of the Danish bridge project over the Great Belt in its presently planned form would inevitably prejudice — and prejudice irreparably — the rights and interests claimed by Finland in these proceedings, that is to say the right of free passage through the Great Belt for drill ships and oil rigs manufactured in Finland. It hardly needs emphasizing that construction of a bridge over the Great Belt with a 65-metre clearance would totally and irretrievably prevent the passage of vessels and craft exceeding that height from the Baltic Sea to the North Sea. This is confirmed by the fact that passage of the drill ships and oil rigs manufactured in Finland through the Danish straits by way of the Sound (or Oresund) is impracticable. As pointed out in the Finnish Application, the depth of the Sound is, in certain parts, less than 8 metres, whereas the draught of some of the vessels manufactured in Finland, including drillships and oil rigs, is up to 15 metres. Furthermore, there is already in prospect a Danish/Swedish project to build a bridge across the Sound which would further restrict the right of free passage through the Danish straits. Dr. Koskenniemi will be responding this afternoon to some of what Finland regards as mis-statements in the Danish Written Observations (particularly at paragraphs 21, 43 to 46, and 55 to 58) on this aspect of the matter.

I turn now to the second issue which has to be considered in the present context: what is meant by "irreparable prejudice"? Here, it can be argued that the jurisprudence of the two Courts does not display total consistency. An early test of irreparability was laid down in the Order by the President of the Permanent Court in the *Sino-Belgian Treaty* case. In this Order, President Huber explained that interim protection was indicated because the possible infraction of certain rights at issue:

> "could not be made good simply by the payment of an indemnity or by compensation or restitution in some other material form" (*P.C.I.J., Series A, No. 8*, p. 7).

This would condition the grant of interim measures of protection upon the criterion of what has been termed absolute irreparability *in law*. But this criterion has a number of deficiencies. It seems to be based on the general concept of reparation in international law as expounded by the Permanent Court in its Judgment of 13 September 1928, in the *Chorzów Factory (Indemnity)* case, where the Court stated *inter alia*:

> "The essential principle contained in the actual notion of an illegal act . . . is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if the act had not been committed."

The Permanent Court continues in that Judgment:

> "Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it — such are the principles which should serve to determine the amount of compensation due for an act contrary to international law." (*P.C.I.J., Series A, No. 17*, p. 47.)

But the Court will readily appreciate that the principles which govern, or may govern, the redress available to an applicant State on the rendering of a final judgment in its favour are not the principles which should be applied in relation to the grant of interim measures of protection. The nature and function of an order on provisional measures differ fundamentally from the nature and function of a final judgment. An order on provisional measures is not designed to impose redress for a wrongful act already committed, but precisely in order to *prevent* irreparable prejudice to rights in dispute on the merits of the case. The Court does not, and should not at this stage of the proceedings, anticipate what its decision on the merits is likely to be; it is concerned solely with the perceived need to preserve the subject-matter of the litigation against acts which are likely to lead to the impossibility of complete execution of the final judgment on the merits. With one possible exception (the *Aegean Sea* case) — and I will discuss that possible exception — the more recent jurisprudence of the Court suggests that the criterion of absolute irreparability *in law* has been effectively abandoned, and has been replaced by a less stringent requirement related to the prospect that restoration of the rights of the applicant State, in the event of a final judgment in its favour, might be rendered impossible if interim measures were not granted. The development of the jurisprudence of the Court in this direction can be traced through the following cases.

In the *South-Eastern Greenland* case, the Permanent Court broadened the circumstances which might motivate an indication of provisional measures by including among these circumstances the case where: "the damage threatening these rights would be irreparable *in fact or* in law" (*P.C.I.J., Series A/B, No. 48*, p. 284; emphasis added).

That is a citation from the Order.

The criterion of irreparability *in fact* considerably extends the range of circumstances which might give rise to an indication of provisional measures.

One then begins to see the development of the concept that one of the principal objects of an indication of provisional measures is to ensure that the possibility of full execution of the final judgment is preserved. A hint of this is already to be found in the Order made by the Permanent Court on 5 December 1939, in the *Electricity Company of Sofia* case, where the Permanent Court ordered that:

> "pending the final judgment . . . the State of Bulgaria should ensure that no step of any kind is taken capable of prejudicing the rights claimed by the Belgian Government or of aggravating or extending the dispute submitted to the Court" (*P.C.I.J., Series A/B, No. 79*, p. 199).

The Permanent Court, in addition, in that case, invoked the need: "to prevent . . . the performance of acts likely to prejudice . . . the respective rights which may result from the impending judgment" (*ibid.*).

The same idea, though expressed in slightly different language, is to be found in the Orders of the present Court on provisional measures in the *Anglo-Iranian Oil Co.* case and in the *Interhandel* case. As the Court will recall, the motivation in the *Anglo-Iranian Oil Co.* case was expressed to be that the Court was:

> "concerned to preserve . . . the rights which may be subsequently adjudged . . . to belong either to the Applicant or the Respondent" (*I.C.J. Reports 1951*, p. 93).

Identical language is to be found in the Court's Order on provisional measures in the *Interhandel* case, although it will be recalled that the Court did not indicate interim measures of protection in that case, in view of the fact that sale of the disputed shares could only go ahead upon conclusion of judicial proceedings pending anew before the United States courts.

But it is in the Court's Orders on provisional measures in the *Fisheries Jurisdiction* cases that we see explicit reference being made to the "irreparability" criterion, in the form of relating "irreparability" to the possibility of securing full execution of the final judgment, if that judgment were in favour of the applicant State. In the *Fisheries Jurisdiction* cases, the Court emphasized the importance of the test of irreparable prejudice by noting that its power under Article 41 of the Statute:

> "presupposes that irreparable prejudice should not be caused to rights which are the subject of dispute in judicial proceedings" (*I.C.J. Reports 1972*, pp. 16, para. 21, and 34, para. 22).

But the Court went even further in the *Fisheries Jurisdiction* cases. It will be recalled that the Icelandic Parliament had passed a resolution on 15 February 1972 extending Iceland's exclusive fisheries jurisdiction from 12 to 50 miles. Both the United Kingdom and the Federal Republic of Germany instituted proceedings against Iceland seeking declarations that there was no basis in international law for the intended unilateral extension of Iceland's exclusive fisheries jurisdiction; that such extension was consequently invalid or, alternatively, not opposable to the applicant States; and that fisheries conservation measures in the disputed maritime areas required agreement with other States concerned. On 14 July 1972, Iceland issued regulations, due to come into force on 1 September 1972, to implement the resolution of the Icelandic Parliament of 15 February 1972. The United Kindgom and the Federal Republic of Germany thereupon immediately sought interim measures from the Court. In its Orders of 17 August 1972, the Court, having stressed the significance of the test of "irreparable prejudice", went on, in the immediately following paragraph of each of the two Orders issued, to observe that to give effect to Iceland's intentions manifested in the regulations issued on 14 July 1972:

> "would prejudice the rights claimed by the United Kingdom [or the Federal Republic of Germany] and *affect the possibility of their full restoration* in the event of a judgment in its favour" (*I.C.J. Reports 1972*, pp. 16, para. 22, and 34, para. 23).

Here the irreparability is treated as being manifested by the impossibility of complete execution of the final judgment, if in favour of the applicant State, and quite irrespective of whether the applicant State might or might not be compensated for possible non-execution of the final judgment.

Now, what might at first sight seem to be the one exception to this general trend away from the absolute irreparability *in law* criterion and in favour of the alternative (and more liberal) requirement of the impossibility of complete execution of the final judgment if in favour of the applicant State is, as I indicated earlier, to be found in the Order of the Court on provisional measures in the *Aegean Sea* case. There, Greece had asked the Court *inter alia* to indicate the following provisional measure:

> "unless with the consent of each other and pending the final judgment of the Court in this case, refrain from all exploration activity or any scientific research with respect to the continental shelf areas within which Turkey has granted such licences or permits or adjacent to the Islands, or otherwise in dispute in the present case".

The Court motivated its refusal to indicate this particular provisional measure by observing:

> "In the present instance, the alleged breach by Turkey of the exclusivity of the rights claimed by Greece to acquire information concerning the natural resources of areas of continental shelf, if it were establsihed, is one *that might be capable of reparation by appropriate means*; and . . . it follows that the Court is unable to find in that alleged breach of Greece's rights such a risk of irreparable prejudice to rights in issue before the Court as might require the exercise of its powers under Article 41." (*I.C.J. Reports 1976*, p. 11, para. 33.)

At first sight, this appears to constitute or could be argued to constitute, a partial reversion to the absolute irreparability *in law* criterion formulated by President Huber in the *Sino-Belgian Treaty* case. But closer analysis shows this, I would submit, not to be the case. Greece had invoked two highly contentious bases of jurisdiction — Article 17 of the General Act of 1928, and the so-called Brussels communiqué of the Greek and Turkish Prime Ministers of 31 May 1975. There seems little doubt that the Court was influenced in its decision not to grant provisional measures in the *Aegean Sea* case by serious doubts among the judges as to whether the Court had, or would have, jurisdiction to proceed to the merits of the case. The Order rejecting provisional measures in the *Aegean Sea* case was made by twelve votes to one; but there were eight separate opinions, seven of which raised the question of the jurisdictional basis for action by the Court under Article 41 of the Statute. In its subsequent Judgment of 19 December 1978, on the issue of jurisdiction in the *Aegean Sea* case, the Court found, by twelve votes to two, that it was without jurisdiction in the case. The same judges who voted for the rejection of the request for provisional measures in the *Aegean Sea* case also voted in favour of the subsequent judgment declaring the Court to be without jurisdiction in the case. Sztucki has observed:

> "Taking into account the already mentioned symmetry of votes on the Order and on the Judgment; and taking further into account the massive

> emphasis on the jurisdictional aspect of interim protection put by the judges in their individual opinions in a situation in which this question might appear immaterial in view of the rejection of the request on other grounds — there seems to be room for a qualified guess that the order in the *Aegean Sea* case was in reality motivated at least as much by poor prospects of substantive jurisdiction as by the 'reparability' of the prejudice against which interim protection was sought." (Sztucki, *op. cit.*, p. 249.)

Now, Finland is *not* inviting the Court to speculate on the (unexpressed) motivations of the judges composing the Court in 1976. It simply cites this particular comment as being illustrative of the need to consider carefully whether the passage which I have cited from the Court's Order on provisional measures in the *Aegean Sea* case does indeed constitute a reversion to the absolute irreparability *in law* criterion. Finland submits that it does not, and derives support for this view in a number of the separate opinions delivered on that Order. For example, President Jiménez de Aréchaga (and we are of course delighted to see him with us today) states *inter alia* in his separate opinion:

> "In cases in which there is no reasonable possibility, prima facie ascertained by the Court, of jurisdiction on the merits, it would be devoid of sense to indicate provisional measures to ensure the execution of a judgment the Court will never render." (*I.C.J. Reports 1976*, p. 15.)

So also as Judge Mosler states:

> "The Court, when it actually indicates interim measures, should have reached the provisional conviction, based on a summary examination of the material before it (including written observations of a party not represented) and subject to any objections which may be raised in subsequent proceedings, that it has jurisdiction on the merits of the case." (*Loc. cit.*, p. 24.)

Judge Mosler indeed later observes in his separate opinion that the request had to be rejected "for the sole reason that the jurisdiction of the Court [was] not sufficiently established" (*loc. cit.*, p. 25).

Thus, what appears primarily to have motivated those judges who delivered separate opinions on the Court's Order denying provisional measures in the *Aegean Sea* case was serious doubts as to the Court's jurisdiction on the merits of the case. The motives given in the Order itself do not appear to correspond to the real motives and anxieties of the majority of the judges, at least if the content of the eight separate opinions is taken into account. For this reason, Finland does not regard this isolated mention of the potential "reparability" of the alleged prejudice as involving a reversion to the absolute irreparability *in law* criterion for the indication of provisional measures.

Finland submits that the recent jurisprudence of the Court suficiently demonstrates, particularly if this analysis of the Order in the *Aegean Sea* case is taken into account, that a prejudice is considered to be irreparable for the purpose of an indication of provisional measures if it would render impossible full execution of the final judgment and thereby full restoration of the rights of the applicant State (assuming the Court were to find in its favour); and this irrespective of whether or not the applicant State might be compensated for the non-execution of the final judgment.

Applying this principle to the circumstances of the present case, it will be apparent that completion of the bridge project over the Great Belt in its presently planned form will constitute irreparable prejudice to Finland's rights and interests. Even continuation of construction work in connection with that bridge project in its presently planned form constitutes irreparable prejudice to Finland's rights and interests, given that the construction work is directed precisely towards completion of the bridge project in a form which will irreversibly prevent the passage of those drill ships and oil rigs manufactured in Finnish shipyards for which Finland asserts a right of free passage through the Great Belt. Finland accordingly contends that the requirement of irreparable prejudice, as a pre-condition of the grant by the Court of provisional measures, is fully met in this case, having regard to the materials presented in the Finnish Application and request for provisional measures.

Finland notes that Denmark, in paragraphs 136 to 138 of its written observations, appears to be arguing that the Court should revert to the "absolute irreparability in law" criterion for an indication of provisional measures. As my analysis of the jurisprudence of the Court amply demonstrates, that criterion originally relied upon, at least in part, by President Huber in the *Sino-Belgian Treaty* case, has now been effectively abandoned.

URGENCY

Mr. President, Members of the Court, I now turn to the question of urgency. As a matter of principle, the element of urgency underlying a request for provisional measures is already reflected, as a matter of procedure, in the 1978 Rules of Court governing the handling of such a request. Thus, Article 74 of the Rules of Court particularizes this requirement of urgency by providing, in paragraph 1, that: "A request for provisional measures shall have priority over all other cases" and by providing, in paragraph 2, that:

> "The Court, if it is not sitting when the request is made, shall be convened forthwith for the purpose of proceeding to a decision on the request as a matter of urgency."

Thus, the procedure before the Court applicable to a request for provisional measures is specifically geared towards dealing with such requests urgently. But these particular provisions of the Rules of Court were adopted not simply to reassure States that requests for provisional measures will be handled expeditiously. They also reflect the understanding that issues submitted to the Court in requests for interim protection are issues that demand urgent treatment; in other words, that urgency is an essential quality of a request for interim measures and that a request lacking that quality is not one for such measures within the meaning of Article 41 of the Statute and the relevant Rules of Court.

This view of the matter is confirmed by the jurisprudence of the Court. In particular, the Order of the Court on provisional measures in the *Pakistani Prisoners of War* case is directly relevant on this point. In this case, the requesting State, Pakistan, itself asked the Court, at a certain stage of the proceedings on provisional measures, to postpone for an unspecified period further consideration of Pakistan's request so as to facilitate proposed negotiations with India. In addition, the oral hearings on Pakistan's request were adjourned three times on Pakistan's request, thus extending the duration of the proceedings on interim measures by 18 extra days. Having regard to these considerations, and taking into account in particular the request by Pakistan to postpone for an unspecified period further consideration of Pakistan's request, it is hardly surprising that the Court's Order of 13 July 1973 rejecting the Pakistani request, should have emphasized that:

> "it is of the essence of a request for interim measures of protection that it asks for a decision by the Court as a matter of urgency, as it is expressly recognized by the Court in Article 66, paragraph 2, of the Rules of Court".

(The reference here is of course to the 1972 Rules of Court, now replaced by the 1978 Rules of Court.)

The Court then went on to point out that the Pakistani request to the Court to postpone for an unspecified period further consideration of Pakistan's request for an indication of interim measures:

> "signifies that the Court no longer has before it a request for interim measures which is to be treated as a matter of urgency; and . . . the Court was not therefore called upon to pronounce upon the said request" (*I.C.J. Reports 1973*, p. 330, para. 14).

This having been said, the requirement of urgency has not been treated by the Court, whether in relation to the procedural or substantive aspects of the matter, as a requirement of extreme urgency. As regards the procedural aspects, the Court has not permitted the need to decide upon a request as a matter of urgency to override other considerations also mentioned in the Rules of Court, such as the need, mentioned in Article 74, paragraph 3, to fix a date for a hearing "which will afford the parties an opportunity of being represented at it". In a number of cases, the Court has postponed or adjourned oral hearings to accommodate the wishes of the respondent State or, as in the *Pakistani Prisoners of War* case, the applicant State.

As regards the substantive aspects of urgency, and analysing those cases in which an indication of provisional measures has been given by the Court, it would appear that in some cases (the *Sino-Belgian Treaty* case, the *Anglo-Iranian Oil Co.* case, the *United States Diplomatic and Consular Staff in Tehran* case, and the *Military and Paramilitary Activities in and against Nicaragua* case) — in all these cases the events being complained of and forming the subject of the request for provisional measures had already taken place. In other cases (the *Fisheries Jurisdiction* cases and the *Nuclear Tests* cases), the events being complained of were or could be expected to take place within a number of weeks.

What of the present case? Finland submits that it falls somewhere between these two categories. It may be argued — and has indeed been so argued in the Danish written observations — that any irreparable prejudice to Finnish rights and interests will arise only when the bridge project has been *completed* in 1996 or 1997 and when the free passage through the Great Belt of drill ships and oil rigs manufactured in Finland will have become physically impossible. It is also contended in the Danish written observations that the Court will have given its decision on the merits of the case well before 1996 or 1997. But, in Finland's submission, this view of the matter ignores entirely a number of highly relevant factors:

(1) First factor, the bridge project over the Great Belt is part of a complex of projects which, though separate, are inter-connected because they are all designed to provide a fixed link for rail and road traffic over or under the Great Belt. Even Denmark concedes that the Great Belt project constitutes — and here I am quoting from paragraph 25 of the Danish written observations — constitutes "an integrated whole". Now, the inter-connection is such that the completion of any one of these projects is heavily dependent, within the framework of the overall plan, upon eventual completion of the other parts of the complex of projects in their *presently planned form*. Although it is the bridge project over the Great Belt which presents, and will continue to present, the greatest prejudice to Finnish rights and interests,

the completion of any one of the complex of projects could indirectly prejudice Finnish rights and interests because the overall plan, as it stands at present, makes no attempt to take account of those rights and interests.

(2) Finland is already suffering economic damage as a result of public knowledge that the planned bridge over the Great Belt will have a clearance of only 65 metres. The Rauma-Repola Offshore Company is already experiencing a falling-off of orders for drill ships and oil rigs manufactured in their shipyard in Finland. Of course, this may be partially attributable to the effects of economic recession in those industrialized countries which provide customers for drill ships and oil rigs; but it may equally be partially attributable to the fact that potential customers are now aware that passage through the Great Belt will become physically impossible for drillships and oil rigs manufactured in Finland as soon as the Great Belt bridge has been completed in its presently planned form. The time-lag involved in the construction of such massive structures as oil rigs designed for offshore exploration or exploitation activities may already, I put it no harder than that, may already be discouraging potential customers uncertain whether the rigs, when completed, will be able to proceed to their final destination. Accordingly, irreparable prejudice is *already* being caused to Finnish claimed rights and interests as a result of the planned Great Belt bridge. And that prejudice is bound to become even more apparent than it is today as construction work on the bridge proceeds and as the effects of recession on the oil producing industry world-wide begin to recede.

(3) Finland assumes, and no doubt rightly assumes, that Denmark will make every effort to minimize any disruption to maritime traffic through the Great Belt during the period when the Great Belt bridge is under construction. But some disruption would seem to be inevitable. Finland's anxieties are naturally increased by the knowledge that it is not just *completion* of the bridge over the Great Belt which will finally prevent the physical passage through the Great Belt of these vessels for which Finland is asserting a right of free passage in its Application. The asserted right of free passage may also be adversely affected during the course of the construction works themselves.

For these and other reasons upon which Dr. Koskenniemi will elaborate in his address to the Court, Finland submits that there is indeed an urgent need for the Court to indicate provisional measures in this case in order to protect the rights which the Court may subsequently adjudge to belong to Finland or to Denmark as the case may be.

JURISDICTION

I turn now, Mr. President, Members of the Court, to the third element — jurisdiction, the prospects of substantive jurisdiction.

Now, Finland is well aware of the case-law of the Court concerning the link between a potential indication of interim measures and prospects of the substantive jurisdiction of the Court on the merits of the case. In the present case, to be quite frank, the question of jurisdiction does not present a problem and I need only touch on it very briefly. Finland notes that in paragraph 84 of its Written Observations, Denmark rightly points out that

> "the Court's jurisdiction is not in dispute in so far as both Denmark and Finland according to their longstanding tradition of adhering to procedures for peaceful settlement of international disputes have accepted the Court's jurisdiction under Article 36 of the Statute".

So the Court is fortunately not confronted with any of the complex problems which may arise in indicating interim measures in cases of uncertain jurisdiction.

Mr. President, Members of the Court, you may wonder why hitherto I have made little or no reference to the Written Observations submitted by Denmark on 28 June. Finland has of course had an opportunity (albeit a limited opportunity) to study these observations over the past two days. As I have already indicated, Dr. Koskenniemi will be responding to so much of these Danish observations as relate to the facts of the present dispute. But I feel bound to state that the Danish Written Observations are directed much more towards the merits of the case which Finland asserts than they are towards the Finnish request for interim measures of protection. Finland is participating in these oral proceedings on its request for interim measures of protection on the understanding that they do not trench upon questions or issues which would rightly be for consideration by the Court when it comes to consider the merits of the case. This is *not*, repeat *not*, a preliminary hearing on the merits. It will soon have been apparent from the Finnish Application that there is a genuine dispute between Finland and Denmark on the *scope* of the right of free passage through the Great Belt, which Denmark is pledged to respect. Neither Finland's Application nor Finland's request for interim measures of protection have been advanced frivolously. Finland has, as Ambassador Grönberg has already demonstrated this morning, sought to resolve this dispute through direct negotiations with Denmark. Unfortunately Denmark has refused negotiations on the substance of the Finnish concerns. It would seem, and I say this with respect, that Denmark is seeking to muddy the waters by trying to convert the current oral hearings into some kind of advance hearing on the merits. Finland could make many observations on the slanted presentation in the Danish Written Observations as regards both the facts and the law; but to do so beyond a certain point would be to fall into the trap of anticipatory argument on the merits. Finland must therefore at this stage make a general traverse of all the arguments advanced in the Danish Written Observations which relate to the merits of the present case. This is of course without prejudice to the particular points already made by Ambassador Grönberg and the points to be made by Dr. Koskenniemi. It is also without prejudice to two points which I would like to make even at this early stage of the oral proceedings:

(1) The first is a very simple point. Paragraphs 85 to 123 of the Danish Written Observations relate exclusively to the merits of the case and fall within the general traverse I have just enunciated. But lest there be any misunderstanding arising from the wording of paragraph 87 of the Danish Written Observations, let me make it clear (as I have done already) that Finland's request for provisional measures is confined to drill ships and oil rigs manufactured in Finnish shipyards and does *not* extend to "reasonably foreseeable" ships. In other words "future ships" are *not* the subject of the Finnish request for interim measures.

(2) My second point is this. In paragraph 141 of its Written Observations, Denmark makes an alternative submission that the Court, in the event that it grants the Finnish request in whole or in part, should indicate that Finland undertake to compensate Denmark for any and all losses incurred in complying with such provisional measures, should the Court reject Finland's submissions on the merits. Finland cannot, with all respect, believe that this alternative submission is meant to be taken seriously. It is unsupported by any argument in the Danish Written Observations. The Court will be only too well aware that reparation (or compensation) is one of the normal consequences of an internationally wrongful act; and, in fact, earlier in my address, I cited two passages from

the *Chorzów Factory (Indemnity)* case. Is it seriously being suggested that Finland is committing an internationally wrongful act in seeking to have recognized and acknowledged the right of free passage through the Great Belt of drill ships and oil rigs manufactured in Finland? I personally can think of nothing more disruptive of the prospects of encouraging States to resort to this Court for the settlement of their legal disputes than the suggestion that, in doing so, they risk being asked to give an undertaking in damages against a certain contingency. As a matter of international law, Finland would submit that this alternative Danish submission is ill conceived and cannot properly be indicated by the Court at this stage of the proceedings. There is, indeed, a question as to whether the powers of the Court under Article 41 of the Statute extend so far as to encompass measure of this kind which would have profound consequences in the sense of substantially modifying the risks inherent in instituting proceedings before this Court. No Government takes the decision to institute proceedings before this Court without giving very serious attention to the gravity and importance of the case which they are going to present. To Finland's present knowledge, no request such as that contained in the Danish alternative submission has even been presented to this Court, far less entertained; and this would appear to be confirmed by the lack of any supporting argument in the Danish Written Observations.

In the light of the considerations which I have developed — considerations which are firmly grounded in the jurisprudence of this Court — Finland submits that all the conditions identified by the Court as being required to be satisfied before an indication of provisional measures will be granted are satisfied in the present case. The object and purpose of provisional measures is to preserve the respective rights of the Parties pending a decision by the Court on the merits of the case. It is the asserted rights and interests of Finland in free passage through the Great Belt of drill ships and oil rigs manufactured in Finland which are threatened by the unilateral action of Denmark. These are the rights which need interim protection. Finland does not dispute the right of Denmark, as the territorial sovereign, to construct a fixed link for rail and road traffic across the Great Belt; but Finland submits that this right can be exercised only subject to the limitations which international law imposes — and one of these limitations is precisely respect for the right of free passage for vessels through the Great Belt. This is the basic right which calls for interim protection by way of conservatory measures pending the outcome of the proceedings on the merits of the case; and Finland asks only for the minimum measures necessary to protect that right and ensure that Finland's position in the further proceedings in this case is not irreparably prejudiced. That it would be so prejudiced by continuing Danish action in connection with the bridge project, the effect of which would be physically to deny to drill ships and oil rigs manufactured in Finland the right of free passage through the Great Belt, is clear. Finland accordingly asks the Court to indicate the provisional measures which it has specified in its request.

Mr. President, Members of the Court, I would wish to thank you all most sincerely for the courtesy, attention and patience with which you have listened to my statement.

The Court rose at 12.45 p.m.

SECOND PUBLIC SITTING (1 VII 91, 3 p.m.)

Present: [See sitting of 1 VII 91, 10 a.m.]

ARGUMENT OF MR. KOSKENNIEMI

CO-AGENT FOR THE GOVERNMENT OF FINLAND

Mr. KOSKENNIEMI: Mr. President, Members of the Court. May I first note how honoured I feel to be able to represent my country before you. As most Nordic lawyers I have been brought up to believe in the central role of international law and indeed the role that this Court can play in the establishment of a more peaceful and more just world.

In this third address to the Court today by Finland I shall discuss the factual aspects of the Finnish request for provisional measures. My presentation will build upon the analysis of the law and jurisprudence of this Court as performed this morning by our counsel, Sir Ian Sinclair.

My statement will consist of four parts.

First, I shall describe the geographical situation in the Great Belt strait as the main navigational link between the Baltic and the North Sea. I shall link this geographical characterization with an explanation of its economic significance to the Baltic States generally and to Finland more particularly.

Second, I shall briefly explain the nature of the unilateral action that Denmark has embarked upon so as to change the existing situation.

Third, I shall in somewhat more detail explore the kinds of irreparable prejudice which is suffered by Finland and Finnish rights as elaborated in the Finnish Application in case Denmark will continue its chosen unilateral action to change the navigational situation in the Great Belt.

And *fourth*, my intention is to dwell upon the question of the urgency of an order of provisional measures particularly in light of the Finnish request.

In a nutshell, my four points are intended to show that there is an existing situation of great importance to many countries, but in particular to Finland; that this situation is about to be significantly modified by Danish activity; that the activity threatens to cause irreparable prejudice to existing, undisputed rights which are the subject of the main proceedings in this case; and that it is therefore urgent that provisional measures be indicated to preserve these rights. In the appropriate places, I aim to make some reference to the Written Observations submitted by Denmark on 28 June, though I shall of course reserve our right to come back to those observations more fully at a later stage.

1. THE PRESENT SITUATION: ITS GEOGRAPHICAL AND ECONOMIC ASPECTS

For Finland, as was explained by our Agent, Ambassador Grönberg, the geographical aspects of this case provide the perspective from which the legal rights and duties of the parties are to be ascertained. These aspects will be elaborated in greater detail during the later stages of the procedures. Nevertheless, it might be useful at this stage to view the dispute from its broad geographical perspective.

Finland is a country which possesses a coastline only in the Baltic Sea. The Danish straits are the only natural waterway between the Baltic and world oceans. All maritime transport between Finland and locations outside the Baltic must thus pass through the Danish straits. In this respect, Finland's situation is comparable to that of Poland and, to some extent, the Soviet Union — the latter, however, having access to oceans also from its Arctic and Black Sea ports. All other Baltic nations have a coastline also in the North Sea and thus easy access to maritime locations around the world. All Baltic States are to a greater or lesser extent dependent on the conditions of passage in the Danish straits — but for none of them is this dependence as absolute as in the case of Finland and Poland.

The exceptional dependence of Finland on the conditions of passage in the Danish straits may be illustrated by the fact that last year (1990) over 90 per cent of Finnish exports and 82 per cent of Finnish imports was carried by sea. And out of this total of 52.5 million tons or thereabouts, about 46 per cent passed through the Danish straits. As regards Finnish maritime exports, over 60 per cent (over 11 million tons) travels through the Great Belt or the Sound while out of imports, the relevant share is 37 per cent (12.5 million tons).

But the importance of the Danish straits is not restricted to their role as an important — indeed the only — natural waterway for goods and people to travel between the coasts of Finland and world oceans. The conditions of passage there are also crucial for an undisturbed functioning of a flourishing shipbuilding industry in Finland. During the period 1982-1988, for example, shipbuilding accounted for over 10 per cent of the value of Finnish exports from the metal and engineering industry. During the peak years (1982, 1983) its share of the exports in those branches was well over 20 per cent. During the past years, Finland has established itself as one of the major shipbuilding nations in Western Europe. Specializing early, the Finnish yards are now building a relatively high number of large special-purpose vessels. In 1989, for example, Finnish yards delivered 61 ships with a combined tonnage of over 500,000 GRT. The main international contenders for these orders have been France, Germany, Italy and, of course, Finland. Despite the international shipbuilding crisis, the building of large passenger and special vessels seems to continue as before.

Now it is clear that both Finland's international trade as well as shipbuilding industry are completely dependent on the conditions of passage in the Danish straits. Let me now briefly describe what those conditions are presently.

Two straits, as you are aware, constitute the principal international waterways between the Baltic and the North Sea. *The Sound* (Oresund) is located between the Danish island of Sjaeland and the southern part of Sweden (Skane). The *Great Belt* is situated between the Danish islands Fyn-Langeland in the west and Sjaeland-Lolland in the east. Of these two, the Great Belt is the one used for transit by the largest and the heaviest vessels in terms of tonnage. Though the number of individual passages by ships in the Sound presently is higher than in the Great Belt, the Great Belt is displacing the Sound as an international passage-way if measured by tonnage. During the 1980s transit traffic in the Great Belt has been steadily increasing from around 18,500 passages in 1982 to over 20,000 large ships annually in 1987. In 1987 there was a daily traffic of almost 60 larger ships (over 50 GRT) in the Great Belt.

The operative difference between the conditions of passage in the two straits — the Great Belt and the Sound — relates to their depths. The official depths at medium water listed for the two channels in the Sound are 7.5 and 7.7 metres, while the Great Belt will allow passage by ships with a depth of up to 17 metres. The Great Belt is more than twice as deep as the Sound and constitutes thus the only deep-water passage-way between the Baltic and the North Sea.

Because of public concern for the marine environment and, as the Head of Inspectorate of the Royal Danish Administration of Navigation and Hydrography has observed, due to "the increasing number of deep-draft vessels"[1] in the Great Belt, a special waterway — the Route T — was established and recommended to shipping by the International Maritime Organization (IMO) in 1975[2]. Since the establishment of the Route T also a traffic separation scheme has been established in the Great Belt, at precisely the place which the projected East Channel bridge is to cross.

Now, there are many types of ships which cannot use the Sound because of its insufficient depth. Though regular passenger vessels have no difficulty in navigating through the Sound, the Great Belt is the only waterway that can be used by special deep-draught vessels. In this connection, it is relevant to note that the relative success of the Finnish shipbuilding industry is related to its early specialization. Finnish yards have concentrated on constructing ice-breakers, other ice-protected ships, research vessels, very large luxury cruisers and other special purpose ships. The demand for such ships has been less vulnerable to fluctuations in the shipbuilding market. Through specialization, it has also been possible for a small country like Finland to direct limited resources in an efficient way.

And here, of course, I come to the factual heart of our present problem. There are many kinds of special ships built in Finland which simply cannot use any other passage than the Great Belt to travel between the Baltic and the North Sea, or for which the alternative, the Sound, would be an imprudent choice. For example, seven of the regular ferries and very large luxury cruisers built by the Finnish company, Kvaerner Masa-Yards, during 1986-1991, have had a draught ranging from 6.5 metres to 8.0 metres. The newest passenger liner, projected for delivery in 1992, is to have a draught of 8 metres. The heavy-load transport vessel *Transshelf*, built by the same company in 1987, possessed a draught of almost 9 metres.

Of particular interest for this case, however, are three other categories of ships, namely, drill ships, semi-submersible drill rigs and jack-up rigs, towed or transported by heavy-load transport vessels. Much discussion will, undoubtedly, be devoted to the character of these vessels and to the law applicable to their maritime activities during the main proceedings. I shall not go into that matter here. I would only like to note that, the Finnish company, Rauma-Repola Offshore, has manufactured 23 such vessels since 1972, among them being two so-called jack-up rigs presently being constructed in co-operation with a company from the Soviet Union. These are vessels with a transit draught usually from about 7 metres to close to 12 metres. For at least six of these vessels, the Great Belt has been the only available passage-way. As you are aware, the height of such vessels well exceeds 65 metres — the height of the planned East Channel suspension bridge projected to cross the main navigable channel of the Great Belt.

Now, our Danish colleagues have, in paragraphs 55 to 57, in particular, of their Written Observations, argued that all but one of these crafts would have been able to pass through the Sound because of the official median-water depth of the Sound of 7.7 metres. This is not correct. In achieving that result, our Danish colleagues have neglected several factors.

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[1] Anker Nissen, "Route T. A major Danish Waterway", *PIANC-AIPCN Bulletin 1991*, No. 72, p. 131.

[2] IMO Res. A.339 (IX), November 1975.

Firstly, four of the semi-submersible rigs have been equipped with thrusters — that is to say propulsion systems with propellers which make them independently navigable. These thrusters add 3.9 metres to their draught, making their total draught rise to 11.7 metres. This applies to rigs RR-1, 2, 7 and 18 in Annex 15 of the Danish Written Observations.

Secondly, both of the two jack-ups (RR-21 and 23) as mentioned in Annex 15 of the Danish Observations, have been transported by heavy-lift ships and their combined transportation draught has been 9.5 and 8.5 metres. For these six craft, passage any other way would have been impossible.

Thirdly, the rest of the craft — 14 drill ships and semi-submersibles — which have been delivered through the Danish straits, have had an actual draught of 7 to 7.5 metres, as measured at the shipyard at delivery (in contrast to the figures concerning *planned* draughts, as contained in Annex 15 of the Danish observations).

Now one need not be an expert in offshore technology to realize that, with a draught of 7.3 metres or 7.5 metres, the passing of a strait with a nominal draught of 7.7 metres, one would be making, indeed, an extremely hazardous journey. Bearing in mind, for example, that the resolution by the International Maritime Organization No. 620, 1987, recommends that large ships navigating through the entrances to the Baltic take into account that charted depths "may be decreased by as much as 2 metres owing to unknown and moving constructions". And, in fact, records show that out of these craft only one has gone through the Sound, while at least 10 have navigated the extra 130 nautical miles that it takes to go from Finland to the North Sea, through the Great Belt. And here I must add that, despite our attempts, we still lack records of the actual routes used by seven of these craft, while one has been delivered to the Caspian Sea through another route.

Finally, the official draughts of 7.5 and 7.7 for the Sound have, I believe, been measured at median level water. It is our understanding that the water level may change in the Danish straits due to strong easterly or westerly winds, up to 2 metres. Taking this into account, I believe it evident that even these craft — whose draught is only from 20-70 centimetres less than that of the depth of the Sound — have passed through the Great Belt. But, we shall furnish information to the Court and to Denmark of the actual routes used by these remaining craft, as soon as we receive it from the buyers.

And thus, from the Finnish perspective, any attempt to restrict the conditions of passage in the Great Belt will constitute an immediate threat to the very basics of our shipbuilding industry. For us, it is not enough that the conditions are maintained at a level that most ships or that most "normal" ships can continue to enjoy them. The right of free passage is not restricted to any particular category but applies to all ships.

For a country whose geographical position is that of Finland's this is the only guarantee for its continued participation in international maritime commerce with a footing equal to that of other maritime nations. As Ambassador Grönberg observed in his opening statement for Finland, the freedom of the high seas is only as broad or narrow as the conditions of passage in the Great Belt.

2. THE DANISH PROJECT

I come now to my second point: description of the intended action by Denmark so as to change the existing situation.

The current plan for a fixed traffic connection over the Great Belt has been broadly described in the Finnish Application and, indeed, in the Danish Written

Observations. No doubt much detail about the plan will be given by our Danish colleagues both now and during the later stages of the proceedings. For the present purpose it is, I believe, sufficient to give a very brief outline of the project in order to be able to assess the prejudice it will cause to Finnish rights and the urgency of an indication of provisional measures.

The fixed link over the Great Belt will stretch from Knudshoved on Fyn to Halsskov point on Sjaeland. The geographical location is clearly indicated in Map 3, annexed to the Danish observations. It will carry both a railway connection and a motorway connection. The project consists of three distinct though interrelated parts:

(1) The first part is the *West Bridge* between Fyn and Sprogoe island in the middle of the strait. This will be a fixed concrete bridge 6.6 km long, carrying both road and rail traffic over the West Channel, in which there is presently no international navigational route. Nevertheless, the West channel, too, is used for light maritime traffic by ships under 1,000 deadweight tons. The navigational clearance of the West Bridge will be only 18 metres — a compromise solution adopted between the original suggestions of either 14 or 22 metres.

(2) The second part of the project is the *East Tunnel*, this will be 8 km long. It will link Sprogoe island with Halsskov on Sjaeland. This part of the fixed link will consist in fact of two drilled railway tunnels, each containing one railway.

(3) And the third part of the project will be the *East Bridge*, a 6.8 km long suspension bridge carrying motor traffic on four lanes plus an emergency lane. It will start at Sprogoe island again, in the middle of the channel and land at Halsskov on Sjaeland. Its navigational clearance will be 65 metres. The bridge will have a free span of 1,624 metres between the middle pair of piers, through which navigation in the Great Belt will be directed.

Let me stress in this very brief description the unitary but interconnected character of the project as a whole. There is both a degree of independence between and a distinct connection among its three parts. Though the right of passage through the Great Belt will be only definitely limited by the finalization of the East Bridge, the interconnected character of the project as a whole means that every earlier activity will lead closer to that final end.

Though the idea of establishing a fixed link over the Great Belt is an old one, the present project dates back to Danish Law No. 380 of 10 June 1987. The company that was created to undertake the project was established through provisions in that act and the modalities and timetable for the project were likewise based on it. The project is a Danish one. It is purely a national effort to exercise jurisdiction, which has the consequence of modifying the conditions of passage in an international strait which are laid down by international law.

3. The Question of Irreparable Prejudice to Finnish Rights

I come now to my third point, the question of irreparable prejudice to Finnish rights.

In a general way, I believe it evident that Finnish rights will be prejudiced by the on-going Danish project to close the Great Belt from ships of over 65 metres' height. There are several types of deep draught vessels the height of which exceeds 65 metres and for which the Great Belt is the only channel deep enough to allow unhampered passage. The question now is, as our counsel elaborated in the morning, if there indeed is a likelihood or at least a possibility that Finnish rights might be prejudiced by Danish action already before the final judgment in this case — or at least, as this Court saw it in the *Nuclear Tests* cases, that the possibility of damage is not excluded (*I.C.J. Reports 1973*, pp. 105, 141).

Were this a matter of municipal law before a national court, we would be facing a very typical cause for an interlocutory injunction. A person, A, is undertaking construction work in his property; his neighbour, B, thinks that this creates prejudice on the rights B has for the full enjoyment of his property. The construction might, for example, prevent lorries from using the common road that leads into B's real estate. Surely, if B asked to take the matter to a municipal tribunal and asked for an interim order to the effect that A should not complete the construction pending the time the matter is being dealt with, there would be few jurisdictions denying B that temporary relief.

Now we are not, of course, before a municipal tribunal. But I submit that the reasons for which we would immediately recognize the situation calling for the order of provisional measures are equally present in international as well as national law. There is the existing legal situation; the continuous enjoyment of free passage through the Great Belt by various offshore and other craft built in Finland since 1972. There is an attempt to change that situation — the Danish project — and a challenge to the legal justification for the change. Surely it would be difficult to accept that the change could continue unmodified and the substance of the right be prejudiced while the very entitlement to undertake that change is under a legal challenge. The element of conservation, preservation of existing rights, provides the connecting juristic rationale.

As was pointed out by the counsel for Finland this morning, there is a direct connection between the rights which are sought to be preserved in the request and those that are in dispute between the Parties. He pointed out also that, though there is a connection, the request by no means intends to achieve an interim judgment. The request is for a conservatory measure, not for the recognition of the substance of the claimed rights.

The situation is not without analogy in the practice of this Court. In the *Fisheries Jurisdiction* cases, the Court observed that:

> "the immediate implementation by Iceland of its Regulations would, by anticipating the Court's judgment, prejudice the rights claimed by the United Kingdom and affect the possibility of their full restoration in the event of a judgment in its favour" (*I.C.J. Reports 1972*, pp. 16 and 34).

Here there was a unilateral act aimed at changing the existing situation and consequently an order for the preservation of the rights of the applicants. Prejudice, as the Court then had occasion to observe, was constituted by the manner in which the implementation *anticipated* the judgment. In the present case, as well, we find a right (or at least a right as it is claimed to exist — the right of passage through the Great Belt) which is being prejudiced by the immediate implementation of Danish Law No. 380. Such implementation would clearly affect the possibility of the restoration of that right in case of a judgment in Finland's favour.

The fact that injury to Finnish rights is irreparable in the sense disclosed by the jurisprudence of this Court has already been explained by our counsel. As he pointed out, irreparability cannot be taken to mean an absolute irreparability, irreparability in law — after all, anything can be made subject of compensation — but irreparability in fact.

In the *Anglo-Iranian Oil Co.* as well as in the *Fisheries Jurisdiction* cases, the Court indicated provisional measures to protect rights whose violation would clearly have been remediable by damages — thus the Finnish case would come under the relevant requirement even if one construed it only narrowly to relate to the economic losses of one company. However, that is not the perspective Finland has on the substance of this matter. Our perspective is larger and relates to any unforeseen effects that the Danish project might have. Here I note that once the project has reached, what could be called a "point of no return" — that is to say, once the commitment has been made by Denmark to foreclose navigation by ships of over 65 metres — any construction work, any physical measure to exclude alternative solutions will, of necessity, diminish the physical possibility for the full restoration of Finnish rights. If provisional measures were not granted, this would allow the signature of contracts and the continuation and conclusion of construction works in such a way that, in case the rights claimed by Finland were granted, a declaration of Finnish rights — as requested in the Application — would be insufficient as a remedy. Plans should be cancelled and whatever constructions there would have been erected to prejudice the right of passage should have to be torn down.

The same point can of course also be made in another way ; the continuation of the fixed link project as planned would also seem to fall squarely in the category of activities likely to aggravate or extend the dispute. It would make accommodation and compromise more difficult to attain as alternative ways to safeguard the right of passage would diminish each day in the course of the construction work with each of the three parts of the project.

But irreparable prejudice does not only occur to Finnish rights, as it were, *in abstracto* if the Danish plans continue unmodified. Tangible economic interests are also affected.

The continuation of the bridge project means, of course, that Finnish shipyards can no longer fully participate in tenders regarding ships which would be unable to pass through the Great Belt after the East Bridge has been completed. Let me note here that with a bridge of 65 metres, the operative passage is, of course, much lower. In the first place, according to official Danish information, due to high westerly wind, there may be in the Great Belt in extreme conditions a rise of the sea level by 2 metres above mean sea level [3]. With heavy traffic, the level of the bridge itself will fall perhaps as much as 2 to 3 metres and most countries, including I believe the Nordic countries, require a free clearance of 1 to 2 metres. In other words, the operative height of the bridge will be 60 metres or even less.

That this is insufficient for even immediate purposes becomes clear as the largest passenger ships already possess a height of 56.3 metres. Besides, five heavy-lift ships manufactured at a Finnish shipyard in 1985-1986 have had a height each of over 62 metres. At the earlier phases of the plans, the Danish Ministry of Industry had observed that vessels had been built with mastheads up to 75 metres and that there were in existence ultra-large crude oil carriers reaching the height of 68.6 metres [4].

But the most immediate impact, and the one relevant for this request, will be felt by the Finnish offshore industry, in particular the Finnish company Rauma-Repola Offshore Oy. The height of the craft produced or under production at Rauma-Repola Offshore has varied between 80 metres, and those are drill ships, and 150 metres, and those are jack-up rigs. None of them could have travelled through the Great Belt had the now projected fixed link been in existence. As I pointed out earlier, and in contrast to the contentions made by Denmark in its Written Observations, for most of them, there would have been no other available passage-way at all, as the Sound would have been too shallow. The latest craft — constructed in co-operation with Vyborg shipyard in the Soviet Union — will pass through the Great Belt during this summer. The following passage will take place sometime next year. Though not many passages have occurred during the most recent years, the peak years — 1977 and 1982 — saw a delivery of four and three such vessels.

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[3] Anker Nissen, "Route T. A Major Danish Waterway", *PIANC-AIPCN Bulletin 1991*, No. 72, p. 133.

[4] Cf. *News from Storebælt*, No. 6/89, p. 2.

Let me note here that the Danish Written Observations completely by-pass the question of the project's effect on the future plans of Rauma-Repola Offshore. Those plans started already in early 1980s when a channel was dredged to the Tahkoluoto Harbour to a depth of 17.5 metres at a cost of approximately 50 million US dollars. This was done partly to allow the company to manufacture all types of craft which can utilize the Great Belt to the full. At the same time the company took in use innovative techniques to assemble both jack-ups and semi-submersibles in its shipyard.

At present, the international market for offshore exploration craft has experienced a lengthy standstill. Nevertheless, out of the 10 craft now under construction in the world, Rauma-Repola Offshore participates in three : two are co-production projects with a Soviet enterprise, one is a contract with the national oil company of a Middle Eastern country. Last year (1990), there were already tender projects for 14 offshore exploration and production craft. During the first half of this present year, the company has already submitted or is submitting tenders for seven craft — none of which (with a possible exception of one, I believe) could pass from the Danish straits using current transportation practices once the project for a fixed link is completed. Let me note that the value of each such craft is approximately from 120 million US dollars to 250 million US dollars. This is a figure which compares interestingly to the very preliminary cost-estimate we have received regarding seven different technical alternatives for opening either one of the two bridges — these estimates ranging from 25 to 500 million US dollars.

The impact of the Danish bridge project on Rauma-Repola Offshore Oy is twofold. Already the very existence of the bridge project in its present form has had and will continue to have an effect on the behaviour of potential buyers. They feel natural hesitation to send enquiries to the company — believing that the company's capacity to deliver offshore craft will be destroyed by the bridge. Now every lost chance means a potentially lost contract. Each rig contract means at least 500,000 man hours of work for Rauma-Repola Offshore and an equal amount for its sub-contractors who are mostly Finnish — i.e., one half of the capacity available. An indication of provisional measures by the Court will give a clear signal to the international offshore market that the Danish plans are disputed and that Rauma-Repola continues to plan its activity on the basis of the right of free passage through the Great Belt hitherto enjoyed by drill ships and oil rigs manufactured in Finland.

The second stage of impact would arise through the completion of the East Bridge as planned. This would make it physically impossible to deliver most types of rigs or drill ships that are demanded by the market complete and ready for drilling. Dividing the assembly of a rig between two sites — as suggested by Denmark — is not an economically feasible option. The competitiveness of Finnish offshore craft is based on the fact that an essential part of construction work can be undertaken in the shipyard which, as I noted earlier, is specially equipped for that purpose. It has been estimated that completing the construction work only after the craft have passed the Great Belt, in the North Sea, will involve both an additional cost of approximately 7.5 to 13.75 million US dollars and an extension of time of delivery of up to four months. This would inevitably destroy their competitiveness in the international market.

Mr. President, Members of the Court, we were rather surprised by the figures our Danish colleagues put forward in paragraph 58 of their observations regarding the costs of disassembly and reassembly of a rig. Of course, I have no idea on what their calculations are based. The indicated costs and the extension of delivery time in the Finnish Application, the one I noted, is based on the experience of Rauma-Repola Offshore in drilling tower construction. It follows as a direct consequence of customers' construction specifications. The estimate is based on the company itself undertaking the reassembly and providing for that purpose the manpower and extra equipment needed. It does not even cover the lost revenue for the client due to extended delivery time. There is here a problem of commercial confidentiality which we are presently trying to overcome. If possible, we shall provide the Court, as well as our Danish colleagues, with a written explanation of the basis of the Finnish calculation during this week.

The impact of the continuation of the Danish project as planned is such that it could not be adequately compensated *ex post facto* should the Court decide in favour of Finland on the merits of this case. In the fist place, the full restoration of Finnish rights would require the pulling down of the East Bridge or whatever other constructions may have been erected to prevent free passage at enormous cost to Denmark. In the seond place, the completion of the project would have significant effects on employment at Rauma-Repola Offshore. The company employs 1,000 people today in an average market situation. Where two exploration rigs are under construction the average number of employees rises to 1,500 and an equal amount of subcontractor manpower is employed at Rauma-Repola Offshore facilities and elsewhere in Finland. Thus, the effects on employment in Finland of the Danish project could be significant. The hardships for the employees and their families cannot adequately be compensated by money at the late stage in which a final judgment might recognize the Finnish rights.

In the third place an important effect is also the loss of credibility in the international market that will affect the company itself. This, together with the extra construction costs would definitely eliminate the company from the market and end offshore construction activities at Rauma-Repola Offshore facilities and probably in Finland.

Finally, as I pointed out earlier, the bridge project will have a general effect on the capacity of Finnish shipyards to submit tenders for very large special ships (let me note, again by way of comparison, that the value of the three very large passenger vessels delivered from the Finnish shipyard I mentioned earlier ranged from 200 to 300 million US dollars each). There is, of course, a degree of uncertainty about such effects — their being dependent on the fluctuations of the market and on assumptions about the intentions of potential buyers. Proving loss of contract is obviously difficult. Nevertheless, as the Court's jurisprudence requires the establishment of a likelihood or a possibility of damage, it seems clear that the relevant test is met.

4. THE QUESTION OF URGENCY

I move now to my fourth and final point, namely, to show that an indication of provisional measures is urgently needed in a fashion required by the Court's jurisprudence. Urgency, notes Sztucki, following this Court's pronouncement in the *Pakistani Prisoners of War* case, "is an essential quality of a request for interim protection"[5]. The requirement of urgency follows from the very nature of interim protection as having to do with prohibiting the unilateral disturbance of the status quo pending a court's deliberations. There should, in other words, exist a threat that an infringement of a party's rights might materialize before the Court has had its final say in the matter.

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[5] V. Jerzy Sztucki, *Interim Measures at the Hague Court* (1983), p. 113.

I submit that such a threat has already arisen and can be eliminated only by the indication of provisional measures. To show this, it is necessary briefly to review the present state of the fixed link project.

Danish Law No. 380 which provides legislative basis for the fixed link project and the background for the Finnish Application was adopted in June 1987. Thereafter, works regarding the three parts of the project have proceeded as follows:

1. *The West Bridge*: the Great Belt Company entered into contract with the European Storebælt Group (ESG) in June 1989. The first bridge elements were placed off Fyn in late 1990. And the first of the West Bridge sections extending above the sea surface were installed as recently as May 1991.

2. *The East Tunnel*: the Great Belt Company entered into a contract with the MT Group, an international consortium, in November 1988. The first boring operations were started in August 1990. By 7 May this year, all four boring machines had stopped due to technical problems. Today, the bored stretch, I believe, constitutes around 861 metres. Though about two-thirds of the tunnel elements have been produced, the tunnel works are over 12 months behind schedule due to technical problems. At a meeting of the Great Belt Company in May 1991, the MT Group (the contractor) estimated that it would take between three to six months to put the machines back in operation.

3. *The East Bridge*: the submission of tenders for the East Bridge was completed in December 1990. On 17 June this year — i.e., two weeks ago — the Storebælt Company (the Great Belt Company) was, I believe, authorized to sign the contracts. No signature, as far as we know, has yet taken place. The tenders are valid until 18 August this year.

It is clear, then, on the one hand, that substantial work for the fixed connection has commenced and is indeed quite far advanced regarding some parts of the project. The whole of Sprogoe Island in the middle of the strait has been complete refashioned so as to create two large embankments for the two bridges landing on it and to begin boring for the East Tunnel. Two artificial islands have been built in the East Channel to carry the anchor blocks for the East Bridge. Though work is proceeding, however, we are still a moment away from action that would create a definite fait accompli. The East Bridge contracts have not yet been signed and construction work in order to close the East Channel has not yet been begun.

With the conclusion of the contracts projected to take place in August this year, the Danish Government will commit itself definitely to completing the fixed link project in accordance with its original plans. As I said, I believe that the validity of the tenders reaches no further than 18 August. In Finland's view, it would be appropriate that those contracts should not be concluded now or, as the case might be, they should be concluded in a modified form so as to make provision for the rights in dispute.

Simultaneously, work is heading towards what I have called a "point of no return", in regard to the West Bridge and the East Tunnel. In regard to some parts of the project, we may already have passed that point. For example, the decision to construct a bored, instead of a submerged, tunnel for railway traffic under the East Channel may already have prejudiced the solution regarding the motorway link.

At this juncture, I believe it useful to anticipate one possible objection to this argument so far. For, as the Great Belt is finally closed only on completion of the East Bridge, and as that event is scheduled to take place only in 1996 or 1997, it may seem that there is no urgency to indicate provisional measures. In the Finnish view, however, and as was already pointed out by our counsel this morning, the completion of the East Bridge marks only the final step in a continuous process in which Finnish rights are irreparably harmed already, long before that final event. The point is, of course, that the three parts in the project — the West Bridge, the East Tunnel and the East Bridge — are interlinked, so that many activities, apparently unrelated to the final closing of the Great Belt, in fact anticipate it, by excluding practical possibilities for accommodating Finnish interests and given effect to Finnish rights in the event of a judgment in our favour.

Let me give just two examples. First, although the ongoing work for the East Tunnel poses no *per se* threat to navigational rights in the Great Belt, the fact that the tunnel alternative is being drilled only for the railway link implies that the motorway link shall be constructed in the form of a bridge. In that sense, even the East Channel constitutes a threat to Finnish rights. Second, it is evident that decisions regarding the mere design of the East Channel Bridge — i.e., that it shall be a suspension bridge — do not concretely threaten Finnish rights. On the other hand, the exclusion of alternatives implied by any decision on the design is, again, a step towards prejudicing the final solution.

In a sense, the very decision to opt for a bridge solution in the East Channel — instead of the tunnel alternative, which existed still in 1987 and is still provided in the relevant Danish law — already created a threat. Still, it is probably correct to say that that decision, taken some time between 1987 and 1989, did not, of itself, constitute a very immediate threat. On the other hand, as I have noted already, continuing and completing the East Bridge, as planned, during the Court's deliberations would be clearly prejudicial.

The matter is complicated and much depends also on the available technical alternatives to satisfy Finnish rights. Thus, for example, it might be possible to safeguard free passage in the Great Belt by dredging a new navigational route in the West Channel of the Strait and constructing the West Bridge — which is not a suspension bridge — with a conventional opening. In such case, continued construction of the West Bridge is of the character to have a degree of prejudice.

Let me note, in this connection, a fact which will become apparent in the later stages of the process and which has continuously complicated the Finnish-Danish discussions: technical experts disagree. They disagree about the technical and about the economic feasibility of the different alternatives to satisfy Finland's interests. The existence of disagreement also fundamentally affects how we view what particular action creates irreparable prejudice to Finland's rights.

It is probably, however, correct to assume that the relevant event which would constitute a definite prejudice to Finnish rights and would prejudice the Court's judgment is situated somewhere between the initiation of the current project and its physical completion. The following intermediate events might come to mind: for example, acceptance of the current overall plan by the Great Belt company; start of tendering procedures (on any of the three phases); signature of contracts; or, physical start of work with any or all of the three projects.

During which of these phases does the situation become urgent, so urgent as to require the indication of provisional measures? Now, merely posing that question, I believe, shows the difficulty of answering it, bearing in mind also that many of these events have already taken place.

In the final analysis, singling out any one event in the total history of the project as the one at which a concrete threat will arise remains a matter of appreciation. A matter on which technical experts disagree. The possibililty that *any* continuation of the project might be prejudicial for the final judgment cannot be rejected out of hand — particularly if attention is on effects on the offshore market. Nevertheless, an indication that Denmark should simply stop this project for the approximately two years that it might take before the final judgment is rendered may not seem reasonable. The point is, however, that what is reasonable and what is not cannot really be determined by anyone else other than the Danish Government itself, subject, of course, to the possibility that the Court might need to indicate more specific measures, should the Danish Government fail to take adequate measures to protect Finnish rights and interests.

For this reason, Mr. President, Members of the Court, Finland has, at this stage, refrained from indicating any particular event or action in the total project at which Denmark should cease pursuing the construction work. It is the Finnish view that an assessment of the relevant technical alternatives and the costs of leaving any of them open, or choosing between them, should be left to Denmark. A choice from among the many practical and technical ways to safeguard Finnish rights *pendente lite* would risk to be arbitrary and pose an unreasonable burden on Denmark. The same risk would be involved in a blanket prohibition regarding the continuance of any activities in the Great Belt. Therefore, it is requested that the Court give a general indication that Denmark take no such action as would impede the passage of ships, including drill ships and drill rigs, to and from Finnish ports and shipyards ; or in any other way prejudice the rights claimed by Finland. In this way, the choice of the appropriate technical alternative and financial risk would be left to Denmark.

The Court rose at 3.55 p.m.

THIRD PUBLIC SITTING (2 VII 91, 10 a.m.)

Present : [See sitting of 1 VII 91, 10 a.m.]

The PRESIDENT : Today we will hear the reply of the Government of Denmark and may I first give the floor to Ambassador Lehmann.

STATEMENT BY MR. LEHMANN

AGENT FOR THE GOVERNMENT OF DENMARK

Mr. LEHMANN : Mr. President, distinguished Members of the Court. Though this is the first time that I have the honour to plead before the Court, it is not the first time that Denmark is appearing before this august assembly to have a final settlement of an inter-State dispute. As is well known to the Court, Denmark is and has always been a strong supporter of the Court's function and role in the international community of nations. This attitude is also reflected in the present case where, as stated in paragraph 84 of our Written Observations, Denmark has taken it for granted that the Court has jurisdiction to adjudicate the matter now before it. We are, therefore, ready to enter directly into the merits of the case, including the merits of the request for indication of interim measures and, with your permission, Mr. President, I shall do so now.

It is indeed a bold submission with which the Kingdom of Denmark is confronted in the present case. The Government of Finland submits that provisional measures be indicated to stop further construction of the bridge over the Great Belt — a project which has been planned and debated in full public for more than half a century, a project which has been specifically notified to all foreign missions in Copenhagen since 1977, a project which has now been under actual construction for more than three years. In the course of this whole process, no reaction to the project has ever come out from Helsinki.

How can Finland legitimately ask for an *urgent* action now to stop a project, if it has never before raised any objection to that project? How can there be "urgency" after so much passivity on the part of Finland? It is Finland which, through its own conduct, belatedly has created an urgent situation for itself. Denmark has been acting all along in good faith and with maximum publicity. When there might still have been time to adapt the project to concrete demands within the margin of a reasonable degree of proportionality, no requests were made by Finland. The Finnish objection is raised years after the implementation of the project started, i.e., at a time where the changes demanded by Finland cannot be made and would be out of all proportion to the changes that the Finnish industry may have to consider in order to adapt their drilling platforms and drilling ships to the dimensions of the bridge over the Great Belt.

From this point of view alone, the request for provisional measures is, I submit, not an appropriate request and Finland should not be allowed to interfere with the project at this advanced stage.

The Danish delegation to these pleadings shall explain to the Court, in more detail, the reasons why the Finnish request should be dismissed.

At this introductory stage of our pleadings, I shall limit myself to state the essential factors which the Danish Government believes must govern the decision on Finland's request concerning provisional measures.

(1) *First*, the *time factor*. According to the Danish view — and, I venture to suggest, according to common sense — this element must be regarded as an essential factor in the Court's deliberations in the present case. Successive Danish Governments have, since the early 1970s, taken great care when planning the construction of a permanent link over the Great Belt to take into account the existing traffic of ships through that Strait. The result of these careful considerations has been that a bridge over the eastern channel of the Great Belt, with a clearance of 65 metres, would not hamper the passage of existing ships through the Strait. In order to have as much assurance as possible about the exact height of the bridge, notifications about the project have been communicated to all foreign missions in Copenhagen.

The Danish notifications were made in 1977 and again in 1987, and in 1989, respectively (see Annexes 2, 8 and 11 to our Written Observations). A note from Finland, protesting against the construction of the bridge was not, however, received in the Danish Ministry of Foreign Affairs until June 1990. In particular, it is to be noted that the Danish Circular Note of 12 May 1977, notifying foreign States about the then ongoing project to construct a high level bridge across the Great Belt, was left unanswered by Finland, meaning that the Finnish Government, along with all other States, did not see any problem from the point of view of international law in the construction of the bridge. If they had, it would have been in accordance with normal diplomatic procedures to react to the Note within a year, as did the Soviet Union. In Finland's Application instituting proceedings in the present case, no reference at all has been made to this crucial Note of May 1977, although it was circulated at a time when the Finnish private company, Rauma-Repola, did produce and transported their offshore units through the Danish Straits.

It is worth noticing in this respect that no general notification was issued when the Turkish Government initiated its plans for the construction of two fixed bridges over the Strait of Bosporus in 1973 and 1988, with a clearance of 64 metres. Nor did Japan issue a notification before erecting bridges across its straits with a maximum clearance of 65 metres. Apparently, both Turkey and Japan found themselves to act within their sovereign rights — as did the international community as a whole, by raising no objections to the building of those bridges.

In short, the Danish Government has acted in good faith when carrying out its plans for the construction of a permanent link between the two main parts of the Realm divided by the Great Belt and cannot, therefore, accept to be stopped in the middle of the enterprise by an objection which is long overdue.

In the view of the Danish Government, the conduct on the part of Finland should not be rewarded by indicating provisional measures against Denmark, but should rather be considered as a factor which estops Finland from pursuing the matter further. Denmark has had no reason to believe that the project to construct a bridge over the Great Belt would not be acceptable to the international community at large, including the Baltic States. No objections have been levelled by States against this project and, relying on this *opinio juris* among States, the sudden change in the position on the part of Finland would, if sanctioned by the Court, cause exorbitant damage to the Kingdom of Denmark.

The time factor may also be looked at from the point of view that no physical hindrance for passage of the Great Belt will exist before, at the earliest, towards the end of 1994. At that time, the present case could easily have found its final decision by the Court. Thus, there is no imminent danger requiring indication of provisional measures.

It may even seriously be questioned — as we have done in our Written Observations, in paragraphs 47 to 57 — if the construction of the bridge across the eastern channel of the Great Belt will represent a hindrance of passage through the Danish Straits for the Finnish mobile offshore drilling units to the extent claimed by Finland.

The drilling units which have been produced and delivered have already left the Baltic and passed through the Danish Straits. As to the drilling units currently under production at Rauma-Repola, we were told yesterday by Dr. Martti Koskenniemi that the latest craft, constructed in co-operation with the Vyborg shipyard in the USSR, will pass through the Great Belt during this summer. The following passage will take place sometime next year.

Where is then the imminent danger justifying the indication of provisional measures, with all the serious consequences that entail, if none of the rigs at present under construction will encounter any problem in passing through the Danish straits, either because they will have passed through the Great Belt before the bridge is finally erected or because the rigs can pass through so-called Drogden channel and I assume here, of course, that one cannot speak of an imminent danger in relation to offshore units and ships contemplated for future construction. That would give innovative companies like Rauma-Repola a permanent veto over decisions taken in this respect by the National Danish constitutional authorities. I am satisfied to note that Sir Ian Sinclair, in his intervention yesterday morning, stressed the fact that Finland's request for indication of provisional measures does not extend to reasonably foreseeable ships, like the Application itself does, but is confined to existing drill ships and oil rigs.

(2) *Secondly*, the factor of *irreparable prejudice or harm* as developed in the case-law of the Court must be taken into account. The State requesting provisional measures must be able to show that irreparable damage will ensue if certain specific measures are not introduced against the other State. In the present case no irreparable damage will ensue from the construction of the bridge over the Great Belt. The economic interests of a private Finnish company will suffer from the construction, but the suffering will not be irreparable. It can be compensated by a certain amount of money, namely the amount required to adapt the construction of the very few oil rigs that may not be able to pass under the bridge or through the Sound. In paragraph 18 of the Application, Finland has itself made an estimate of the additional cost needed in that respect. A figure between US$ 7.5 up to 13.75 million for each construction has been indicated. Even if one takes this figure as a basis and considerable doubt can be raied in this respect, as we have done in our Written Observations, paragraph 58, the discrepancy between that amount and the damage inflicted upon Denmark if the current project were to be stopped in the middle of its construction, is exorbitant. According to our calculations the damage for A/S Storebæltsforbindelsen (Great Belt A.S.) would be in the order of half a billion United States dollars. To adopt provisional measures having such a disproportionate effect would not render justice to the Kingdom of Denmark.

(3) The *third* element which must be addressed is the very foundation or rather lack of foundation of the alleged Finnish right to be preserved through indication of provisional measures. Not even a prima facie case exists in favour of the Finnish contention that the right of passage through the Great Belt applies to all ships, including drill ships, oil rigs and reasonably foreseeable ships entering and leaving Finnish ports and shipyards — irrespective of their heights. It is to preserve this alleged "right" that Finland is asking the Court to decide upon certain

provisional measures. But even if Finland is not required during these proceedings to substantiate fully that it enjoys such a right under international law, it follows from the general principles of law recognized by States that the Finnish Government must be able to substantiate the alleged right to a point where reasonable prospect of success in the main case exists. And the Danish Government fails to see that even the slightest proof towards that end has been established by Finland. It is worth noticing in this respect that Finland has found it appopriate to insert the word "interests" along with the word "rights" in its request for interim measures (see paragraph 13 of the request). In reality Finland is seeking protection for the economic interests of a private company, Rauma-Repola, against the sovereign right of Denmark to construct a historic traffic link between the two main parts of the country. But economic interests do not create legal rights. According to the submissions in the Application, the alleged right Finland is invoking or rather inventing, is an absolute, unconditional and even elastic right applying to future ships.

The Finnish Government admits, though, in their Application, in paragraph 29, that "it is clear that the right of free passage should not be assumed to extend to any imaginable vessels". In other words, the right of innocent passage is not an absolute right extending to whatever kind of vessel one could imagine for the future. So, at least we agree on that question. Then the question arises: where is the limit to the right of innocent passage?

In the present case the question is whether offshore units, such as oil rigs and vessels with drilling tower and equipment installed reaching heights of up to 150 metres and more, can qualify as ships demanding a certain height clearance in relation to the construction of a bridge over the Great Belt. The answer is that they cannot. If they could, Denmark's right to construct such bridges would be eliminated. In other words, private companies like Rauma-Repola Offshore Oy, which construct mobile offshore drilling units, must bear the risk themselves for inventing constructions with extreme heights which may not pass through an international strait where prospects exist for erecting bridges.

The legal considerations supporting this conclusion have been outlined in our Written Observations and will be presented in more detail later during today's pleadings. Suffice it at this stage to refer to some essential facts.

The two bridges erected over the Turkish straits in 1973 and 1988, both with a clearance of 64 metres, support the existing legal position according to which international law does not prohibit the building of bridges over international straits as long as existing shipping traffic at the time of the construction is not hampered by the bridge. The same position was taken by Japan when the Government decided in 1973 to construct bridges across the strait between Honshu and Shikoku with a clearance of maximum 65 metres, the same height chosen for the East Bridge across the Great Belt.

No objections having been voiced against the construction of the bridges over the Turkish and Japanese straits, the *opinio juris* among States must be that contemporary international law on the subject supports the conduct of Turkey, Japan and Denmark.

Thus it is clear that not even a prima facie case exists in favour of Finland's contention. On the contrary, there is a clear *opinio juris* among States that a State divided by an international strait has a right to construct bridges across that strait as long as such bridges do not cause any undue hindrance to existing traffic by ships. This right is a simple consequence of the strait State's sovereignty over its territorial waters. The competing right of innocent passage represents a special restriction in that sovereignty and should therefore also be interpreted restrictively.

The right of innocent passage has been safeguarded by Denmark through its decision on a bridge with a clearance of 65 metres. The right of innocent passage simply does not extend to mobile drilling units with heights of 150 metres or more. Thus, it is Denmark which has a right to be preserved, not Finland.

To conclude this general outline of the case as the Danish Government sees it, let me repeat that:

- the lack of any *imminent danger* requiring interim protection of the right claimed by Finland;
- the *passivity* on the part of Finland;
- the lack of any *irreparable harm* to be suffered by Finland;
- the lack of any prima facie case in favour of the alleged Finnish right of passage through the Great Belt;
- all lead the Danish Government to *submit* that the request by the applicant State to have the Court adopting provisional measures in the present situation be dismissed.

Mr. President, this concludes my introductory statement setting out the main elements of Denmark's reasoning concerning provisional measures. We would like now to proceed by substantiating our position, first by explaining to the Court in more detail the pertinent facts of the case. With your permission I shall leave the floor to my colleague and Co-Agent, attorney Per Magid, to make that presentation.

ARGUMENT OF MR. MAGID

AGENT FOR THE GOVERNMENT OF DENMARK

MR. MAGID:

THE PERTINENT FACTS OF THE CASE

Mr. President, Members of the Court, before commencing my oral arguments I would like to say how much I appreciate appearing before the Court. I regard it as a privilege to serve the Court in its task to decide the issues the Parties have submitted.

My task is to give an account of the pertinent facts of the case.

My address will consist of five parts:

First, I shall explain the reasons for establishing a fixed traffic link across the Belt.

Second, I shall give an account of the historical development of the Great Belt Project. I will explain the basis for Denmark's choice of a bridge instead of a tunnel and for the choice of a bridge with a clearance of 65 metres.

Third, I shall address the Circular Notes issued by the Danish Minister of Foreign Affairs and the consultations between Denmark and Finland.

Fourth, I shall turn to the current status of the Project and

Fifth, I shall give the Court a short description of the losses to be suffered by the Danish society in the event of a suspension of the Project.

Finally, there is a set of pertinent facts which I will not address, namely those pertaining to Mobile Offshore Drilling Units and the possibilities for passage of these units through Danish straits. This topic will later be addressed by my colleague Ambassador Per Fergo.

1. REASONS FOR ESTABLISHING A FIXED TRAFFIC LINK ACROSS THE GREAT BELT

The Great Belt effectively separates Denmark into two parts. Approximately half of the population lives on Zealand and the neighbouring bridge-connected islands, the other half in Jutland and on Funen, also connected by bridges.

Transport over the Great Belt is maintained by ferry boats. Strong winds, and in hard winters the occurrence of ice, affect the ferry boat service adversely.

The Great Belt, with a minimum width of approximately 18 kilometres is the bottleneck of the Danish infrastructure.

The fixed link will reduce travel time considerably. It will allow persons living on either side of the Belt to commute to work on the other side. Traffic forecasts have estimated that the increase in the number of passengers and volume of goods carried between the two parts of the country from 1988 to the estimated completion of the Great Belt Project in 1997 will be more than 50 per cent.

The faster and more efficient transportation of goods across the Belt will offer significant logistic advantages to both production and trading companies. The present need for maintaining expensive storage of goods on both sides of the Belt will become obsolete.

Danish economists are in agreement that the fixed link will be of major benefit to the Danish society.

East Denmark will become more accessible for transport from continental Europe. This will facilitate the integration of Denmark into the single market of the European Community.

For Sweden, Norway and Finland, Zealand is the gateway to Europe. The establishment of the fixed link will significantly improve the conditions for transport between the Scandinavian countries and the rest of Europe, in particular if and when the planned fixed link across the Sound between Denmark and Sweden comes into operation.

2. HISTORICAL DEVELOPMENT OF THE GREAT BELT PROJECT

The plans for constructing a bridge across the Great Belt have been considered for more than 50 years. In light of the national importance and the size of such a Project this is not surprising.

Shortly after the end of the Second World War the Danish Government established a commission to study the possibilities for constructing a bridge across the Great Belt. The commission's report was published in 1960. On the basis of the report, the Danish Parliament in 1961 passed an Act authorizing further investigations regarding the construction of a combined road and rail bridge across the Belt. In 1972 the investigations concluded that the construction of a bridge across the Great Belt would be a very beneficial investment for the Danish society. It was recommended that the Project should be undertaken as soon as it was technically possible.

In 1973 the Danish Parliament passed an Act enabling the Minister of Public Works to launch the Great Belt Project (Ann. 1). The Act provided that the bridge would be a combined road and rail bridge executed as a low-level bridge across the Western Channel and a high-level bridge across the Eastern Channel.

In the official comments to the Act it was stressed that the clearance of the high-level bridge should enable Denmark to honour its obligations under international law to allow the continued passage of existing ships.

In the following years, major planning and preparatory works were carried out. In 1977 the plans for the design of the Great Belt Bridge were finalized, and the Danish Ministry for Foreign Affairs advised all missions accredited to Denmark on the details of the Project, including the clearance of the high-level bridge.

In October 1978, shortly before the tender procedure for the bridge was to have been initiated, the Danish Government announced a postponement of the Great Belt Project. The Minister for Public Works stated in an address to Parliament that the Project was postponed because of the serious strain it would impose on the public expenditure budget. The Minister stated in the address that the Project was not abandoned but merely postponed for an anticipated period of four to five years. The Minister also stressed in the address that the 1973 enabling Act would remain in force. In Finland's Application it is stated that the Project was suspended *sine die*. This is wrong.

Finland's Agent said yesterday that "the project met with much internal opposition" and it might be inferred from Ambassador Grönberg's statement that the Project was suspended as a consequence of this opposition. Also this is wrong.

The estimated lapse of four to five years came true. In 1983 the Government decided to examine the possibilities for a resumption of the Project. In 1986 these examinations led to a political agreement between the Government and the main opposition party on the establishment of a fixed link across the Great Belt. The political agreement formed the basis of the 1987 Act on the Construction of a Fixed Link across the Great Belt (Ann. 7).

The 1987 Act is to a large extent based on the ideas, planning and preparatory work executed in connection with the 1973 Act. The 1973 Act was not repealed until the 1987 Act was passed.

Altered political and socio-economic objectives, however, led to revisions of the project. In an effort to strengthen public transport it was decided that the completion of the rail connection across the Great Belt should precede the road connection by a period of three years. It was therefore decided that the Eastern Channel should be crossed by two separate connections, one for road and one for rail traffic.

In accordance with the 1973 project, the Western Channel was to be crossed by a low-level combined road and rail bridge. The Act further provides that the rail connection shall cross the Eastern Channel through a tunnel. The Act finally provides that the motorway shall cross the Eastern Channel either by a high level-bridge or by an immersed tunnel.

The Act presupposed that the Great Belt Project should be implemented by a Government owned private company, A/S Storebæltsforbindelsen ("Great Belt A.S."). The rationale for choosing a Government owned private company was to obtain a separation between the government budget and the economy of the Great Belt Link. The Great Belt Link is to be fully paid for by the users.

The 1987 Act was passed on 10 June. Shortly after, on 30 June 1987, the Danish Minister of Foreign Affairs advised all Foreign Diplomatic Missions accredited to Denmark of the project.

Tender procedures for the railroad tunnel under the Eastern Channel were initiated as early as July 1987 and for the combined road and rail bridge across the Western Channel in October in the same year.

What was the Basis for Denmark's Choice of a High-Level Bridge Instead of a Tunnel?

Regarding the road crossing of the Eastern Channel the official comments to the Act state that a high-level bridge is the preferred alternative. Tenders should in any circumstances be invited for the high-level bridge. The immersed tunnel should only be put out to tender along with the bridge if that was considered technically and economically expedient.

In November 1988 the Minister of Transport decided that only a high-level road bridge should be out for tender. Considerations pertaining to technology, safety, environmental protection and economy determined the decision not to put the immersed tunnel out for tender along with the high-level bridge.

Ventilation of a motorway tunnel posed technical as well as economical problems. The construction of an immersed tunnel would have a significant adverse impact on the marine environment, as 6 million cubic metres would have to be excavated from the sea bottom and deposited elsewhere. Finally, construction costs for the tunnel were estimated to be DKK 1,300 million (US$193 million) higher than for the bridge. In addition operating and maintenance costs were expected to be more than 50 per cent higher for the tunnel.

In June 1989 the Minister of Transport decided that the high-level East Bridge should have a navigational clearance of 65 metres. Why did Denmark choose a height of 65 metres?

Basis for Denmark's Choice of a Bridge Clearance of 65 Metres

The 1973 Act provided that the high-level bridge across the Eastern Channel should be constructed with a view to allowing continued navigational passage.

In 1977 the Danish Ministry of Foreign Affairs advised all foreign missions in Copenhagen on the details of the Great Belt Bridge by a Circular Note (Ann. 2). It was stated in the Note that the high-level bridge across the Eastern Channel with its clearance of 62 metres in accordance with international law would allow international shipping to the Baltic to proceed as in the past.

By a Note dated 29 March 1978 the Soviet Union stressed that the bridge project should not hamper the passage of ships through the Great Belt. The Soviet Union requested that a clearance height of no less than 65 metres should be established (Ann. 3).

Also the official comments in the 1987 Act stated that the execution of a high-level bridge should enable Denmark to abide by its obligations under international law to preserve free passage. It was then estimated that the clearance should be 76-77 metres. Prior to the Bill the Danish Maritime Authority had noted that drill ships built in Finland and in the Soviet Union had a height above water-level of between 60 and 75 metres.

Before a decision was made on the bridge clearance the internationally renowned classification agency Det Norske Veritas was commissioned to make a report on the height of large ships and offshore units (Ann. 10). The report dated 10 March 1989 concludes that all existing merchant ships will be able to pass beneath the bridge with a clearance of 65 metres.

On the basis of the Norske Veritas report Great Belt A.S. recommended to the Minister of Transport that the East Bridge be constructed with a clearance of 65 metres. The Danish Maritime Authority concurred in this view and referred specifically to the possibilities of passage through the Sound for drill ships with a height exceeding 65 metres described in the Norske Veritas report. This clearance also took account of the Soviet request for a bridge with a minimum height of 65 metres.

On 16 June 1989, the Minister of Transport decided on a bridge clearance of 65 metres.

In evaluating Denmark's choice of a bridge clearance of 65 metres the practice in other parts of the world should be kept in mind. It seems as if an international standard of around 65 metres for bridges across international straits and fairways to important port has evolved. Particular attention should be focused on the two bridges across the Bosporus, given the geographic similarities between the Black Sea and the Baltic. These bridges both have a vertical clearance of 64 metres.

3. CIRCULAR NOTES AND CONSULTATIONS

The Circular Notes Issued by the Danish Ministry of Foreign Affairs regarding the Great Belt Project

Mr. President I will now direct the Court's attention to the aforementioned Circular Notes by which Denmark has furnished foreign States with information on developments of the Great Belt Project.

Denmark has informed the Heads of Missions accredited to Denmark in some details on the developments of the Great Belt Project, the most extensive construction project every undertaken by Denmark.

In 1977 the details of the design of the Great Belt Bridges had been finalized. The Danish Minister for Foreign Affairs then issued a Circular Note dated 12 May 1977 advising all foreign Missions of the low-level bridge across the Western Channel and across the Eastern Channel of the high-level bridge with a 62 metres clearance (Ann. 2).

Finland did not respond to this Circular Note. This despite the fact that Rauma-Repola Offshore Oy at the time had already been producing a number of semi-submersible drilling units with a height exceeding 62 metres. Rauma-Repola had at the time delivered at least 4 units, and delivered during 1977 and 1978 an additional 5 units that were presumably under construction or at least contracted for at the time of the Note. Why this silence?

Only two States responded in substance to this Circular Note. The Soviet Union requested that the clearance be changed from 62 to 65 metres (Anns. 3 and 4). The Government of Poland suggested that the future trends within the shipbuilding industry be taken into account at the finalization of the project (Ann. 5).

In 1987 the Great Belt Project was resumed. The Heads of Missions accredited to Denmark were advised on the contents of the new 1987 Act by Circular Note dated 30 June 1987 (Ann. 8). The Circular Note specifically referred to the earlier Circular Note from 1977. The 1987 Note stated that it was not yet decided whether the motorway should cross the Eastern Channel by a high-level bridge or through a tunnel. With a choice of words echoing the 1977 Note it was said that if the bridge solution is selected it will

> "in conformity with international law allow for the maintenance of free passage for international shipping between the Kattegat and the Baltic Sea as in the past".

Finally it was stated that the project had already been started.

No States responded in substance to this Circular Note.

The decision on a high-level bridge across the Eastern Channel instead of a tunnel was made by the Minister of Transport in November 1988. This decision was taken after some debate which had been covered in detail by the Danish news media.

The foreign missions were formally informed of the decision to build a high-level bridge across the Eastern Channel with a clearance of 65 metres by a Circular Note dated 24 October 1989 (Ann. 11).

Consultations between Denmark and Finland

Despite the Danish Circular Notes from 1977 and 1987 on the details of the Great Belt Project, no enquiry was made by Finland to the Danish authorities regarding the Project until 18 July 1989. This was at a time when contracts had already been signed for the East Tunnel and for the West Bridge and tender procedure had been initiated for the East Bridge.

The Finnish approach was simply an enquiry and not a protest. It came in the form of a letter from the Commercial Department of the Embassy of Finland in Copenhagen to the Danish Maritime Authority stating that according to information available to Finland large transports of, for example, drilling platforms would be obstructed by the new bridge. If this was so, the Embassy requested information on other feasible routes (Annex 4 to the Application).

The letter was answered by the Danish Ministry of Foreign Affairs on 29 August 1989 confirming that these large transports could not go through the Great Belt (Annex 5 to the Application). The Ministry advised that an alternative route through the Sound could be employed provided the draught of the drilling platforms was not above 8 metres.

The Ministry also advised that oil rigs might be partly dismantled to allow passage underneath the East Bridge.

Nothing of substance happened between August 1989 and May 1990 when informal talks on the right of passage according to international law were held at the request of Finland. An official Finnish Note was not sent until 19 June 1990 (Ann. 12). The Note stated that Denmark was obliged not to obstruct the free passage of its straits and that negotiations should be initiated to secure the passage of oil drilling rigs prior to making a final decision on the bridge.

In its reply dated 11 July 1990, Denmark maintained that the Great Belt Project was in conformity with international law allowing all ships which had previously passed through the Great Belt continued passage (Ann. 13).

Meetings were held in the latter part of 1990 between the two sides to discuss possible solutions to the Finnish problem. In a meeting on 30 August 1990 Mr. Silvonen, Director of Marketing of Rauma-Repola, stated that the need to preserve the competitiveness of the Finnish yard made it impossible to complete assembly of the oil rigs after passage under the bridge. At the meeting Mr. Silvonen also indicated that, if undertaken, the costs of such necessary modifications should not be borne by the yard itself.

During a meeting between representatives from Finland's Ministry of Foreign Affairs, Rauma-Repola Offshore and the Great Belt A.S. on 17 October 1990, the technical possibilities of altering the East Bridge to allow for passage of the Finnish offshore units was discussed.

Such modifications was not possible because no opening could be inserted in the central part of the bridge above the navigation route as this part of the bridge was a suspension bridge. In addition, a passage opening in one of the approach spans of the bridge was not viable due to the low-water depth.

In response to a Finnish Note dated 5 November 1990, Denmark — without relinquishing its position that the project conformed with international law — agreed to examine the possibilities for modifying the West Bridge by inserting a passage opening. After detailed analysis Denmark concluded that technical difficulties made inserting an opening in the West Bridge practically impossible. An opening would render the passage of high-speed trains impossible and an opening of the required size was in fact unprecedented.

The consultations between the Danish and Finnish representatives ended with the exchange of letters between the Finnish and the Danish Prime Ministers in February 1991 (Annexes 6 and 7 to the Application).

Yesterday Ambassador Grönberg expressed the view that during the bilateral contacts between the Parties Finland tried its best to reach a settlement, whereas Denmark and I quote "has not moved an inch to seek an accommodation".

Denmark cannot concur in this presentation of the negotiations. I have just demonstrated that Denmark, in good faith, and even at a very advanced stage of the project, complied with Finland's request by examining the possibilities for modifying the project to accommodate Finland. Due to the technical difficulties referred to above a passage opening in either of the Great Belt Bridges was not feasible.

Finland, on the contrary, has always refused to even consider solving Rauma-Repola's problem by adapting the transport or production modes of the yard to enable the offshore units to pass under the East Bridge or through the Sound. And why? No technical problems have been advanced by Finland regarding the few modifications necessary to allow the Finnish units to pass through the Danish straits.

In our opinion it is thus not Denmark that has been uncooperative in the consultations between the Parties.

4. CURRENT STATUS OF THE GREAT BELT PROJECT

Mr. President, I will now give an account of the current status of the Great Belt Project.

According to the budget, it will cost DKK 19,030 million or US$2,827 million in 1988 prices to complete the Great Belt Project. If financial expenses are included and corrections made for inflation the total cost is estimated to around DKK 30,000 million or US$4,457 million.

The work on the Great Belt Project is well under way and at an advanced stage. The first part of the West Bridge has already been erected. Drilling work on the east tunnel has started from the Zealand side and from Sprogoe. A tremendous amount of work has already been performed on Zealand, Funen and on Sprogoe. On the East Bridge, a number of preparatory works have been carried out, such as the construction of access ramps and anchor blocks for the suspension bridge.

An estimated total of 11,000 people are working for the contractors, sub-contractors and suppliers on the realization of the Great Belt Project. At this point, contracts have been signed for an amount equalling 56 per cent of the budget and 28 per cent of the budget figure has actually been paid to the contractors.

The tender procedure for the East Bridge has been completed and the Great Belt A.S. is now negotiating with designated contracting groups. The offers, as mentioned yesterday, submitted by the contractors expire on 18 August 1991.

5. LOSSES LIKELY TO BE SUFFERED BY THE DANISH SOCIETY IN THE EVENT OF A SUSPENSION OF THE GREAT BELT PROJECT

Mr. President, I will finally give the Court a short description of the losses likely to be suffered by the Danish society, in the event of a suspension of the Great Belt Project.

Substantial economic and social damage will be inflicted upon the Danish society if Finland prevails in its request for provisional measures and the motorway part of the Great Belt Project is suspended.

A distinction has to be made between the losses that will be suffered by the Great Belt A.S. and the losses that will be suffered by the Danish society in general (see paragraphs 68 to 81 in the Written Observations).

The economic loss imposed on the Great Belt A.S. in the event of a 3-year suspension of the motorway project — i.e. until 31 July 1994 — are relatively straightforward to compute. There are three components of this loss:

(1) increased project costs flowing from a new tender procedure with its inherent price increases. Such increases are inevitable, as all contractors will know the prices in the first bids;
(2) increased interest costs on the motorway part of the total debt of Great Bridge A.S.;
(3) loss of net earnings from toll fees.

The loss suffered by the Great Belt A.S. due to a 3-year suspension of the motorway part has been calculated to DKK 3,100 million, or around US$500 million. These amounts are in net present value, as of July 1991. It should be stressed that the calculation of damages is based on the assumption that only the road link will be affected by an indication of provisional measures.

In addition to this staggering loss, the Danish society in general will sustain significant losses, in the event provisional measures causing a suspension of the works on the East Bridge are indicated.

The main elements constituting these losses are the following:

First, the enjoyment of the substantial timesaving benefits to the society of the bridge will be postponed. This includes the profitable rationalization of transport and stock conditions within industry and trade that will be made possible by the road link.

Second, investments have already been made, in both public and private sectors, relying on the projected date of opening of the motorway bridge. Such investments include connecting work on the existing motorway system to the Great Belt Project. Return on these investments will be deferred.

Third, the operation of the ferry boats between East and West Denmark will, in general, be adversely affected by the delay. Investment and leasing plans have been made relying on the projected date of the opening of the bridge and the discontinuation of ferry boats.

Fourth, a suspension of the motorway part of the project will have repercussions on the employment situation in Denmark.

Thus an indication of provisional measures necessitating a suspension of the construction of the East Bridge will very seriously harm the economy of Denmark.

With the Court's permission, Mr. President, I will now leave the floor to Jorgen Gimsing, professor at the Department of Structural Constructions at the Technical University of Denmark.

ARGUMENT OF MR. GIMSING

COUNSEL FOR THE GOVERNMENT OF DENMARK

Mr. GIMSING: Mr. President, distinguished Members of the Court. It is a very great honour for me to address you at this location and to inform you about the evolution and the present state of the Great Belt Project.

My presentation will be accompanied by a number of illustrations in the form of overhead transparencies[1], so let us go to picture No. 1:

Picture No. 1

The Baltic Sea is an inland sea in the northern part of Europe, separated from the Atlantic Ocean by the Scandinavian Peninsula, the Jutland Peninsula and the Danish Islands. Six nations have ports on the Baltic Sea — Germany, Poland, the Soviet Union, Finland, Sweden and Jutland. Among these, two have ports only on the Baltic Sea (Poland and Finland), whereas the remaining four also have ports outside the Baltic Sea.

Picture No. 2

The ship traffic to and from the Baltic Sea has four main routes to choose from:

(1) the Sound between Sweden and the Danish main island of Zealand;
(2) the T route through the Great Belt between the islands of Zealand and Funen;
(3) the Little Belt between the island of Funen and the Peninsula of Jutland; and finally,
(4) the Kiel Canal, connecting the Bay of Kiel to the mouth of the Elbe River.

In number, the major part of the ships actually utilizes the Kiel Canal; the number of ships being twice as large through the Kiel Canal as through the Great Belt. But in size, the largest ships transit either through the Great Belt or through the Sound.

Picture No. 3

The first bridge to cross the Danish Straits was the Little Belt Bridge, opened to traffic in 1935. This bridge has a vertical clearance of 33 metres and a main span of 220 metres. The main dimensions of this bridge were chosen after having surveyed the size of ships that were actually passing through the Little Belt in the 1920s. The Kiel Canal has, since its opening in 1895, been crossed by several bridges, all with a vertical clearance of 42 metres.

Picture No. 4

The first realistic plans for a bridge across the Great Belt were presented in the 1930s. It was initially assumed that a vertical clearance of 45 metres would be sufficient for the bridge across the Eastern Channel, where the international navigation route it situated. But after further studies, it was concluded that a vertical clearance of 67 metres would be required to allow free passage of all existing ships.

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[1] Not reproduced.

Picture No. 5

A vertical clearance of 67 metres corresponded to the clearance chosen a few years earlier for the Golden Gate Bridge that was opened in 1937 across the entrance to the San Francisco Bay in California. For this bridge it had been a firm demand that the construction should not prevent any existing ship from calling on the port of San Francisco.

Picture No. 6

The fact that the Great Belt bridge with a vertical clearance of 67 metres would allow the passage of all ships was illustrated on a contemporary artist's impression showing two of the tallest ships of those days, namely, the French liner *Normandie* and the training ship *Viking*.

Picture No. 7

The mid-1930s also saw the first realistic plans for a fixed link across the Sound between Denmark and Sweden. At that time it was assumed that bridges with a vertical clearance of 45 metres should be built across both the Danish channel, called Drogden, and the Swedish channel, called Flinterenden.

Picture No. 8

The Sound is today left completely open to navigation and even after the possible construction of a fixed traffic link, the Western part, across the deepest channel in Drogden, will have to comprise a tunnel, as the proximity of the Copenhagen Airport excludes the construction of a bridge.

Picture No. 9

The first official report on a fixed link across the Great Belt was presented by the Great Belt Commission in 1960. In this report it was recommended to construct a high-level bridge across the Eastern Channel with a vertical clearance of 67 metres but it was mentioned that only very few ships would be prevented from passing under a bridge with a clearance of 55 metres. It was therefore recommended to conduct further investigations before making the final decision on the vertical clearance to be provided. The East Bridge proposed by the Great Belt Commission in 1960 was characterized by a maximum span of only 350 metres.

Picture No. 10

The fact that a vertical clearance of around 67 metres was about to be accepted as a standard for bridges across major waterways was further confirmed in 1960, when construction began on the Verrazano Narrows Bridge across the entrance to the Port of New York, at that time the busiest port in the world. The vertical clearance of the Verrazano Narrows Bridge is 217 feet, or 66 metres, within the central 2,000 feet, or 610 metres, of the main span, according to the official sea chart. The existence of the Verrazano Narrows Bridge makes it most unlikely that any cruise ship will ever be built with a higher air draught than 65 metres, as the Port of New York generally is regarded as the most attractive starting point for cruises.

Picture No. 11

The technical and financial problems related to the construction of a fixed link across the Great Belt were further treated in official reports presented in 1968 and 1972. In the latter, the main proposal for a high-level bridge showed a significant increase in the navigation span widths, as two 600-metre openings were to be provided in combination with a traffic separation scheme. However, it was not found necessary to reconsider the vertical clearance, which was stipulated at 68 metres for the unloaded bridge at mean temperature (corresponding to approximately 66.5 metres for the loaded bridge at high temperatures).

Picture No. 14

The Act on the Construction of a Bridge across the Great Belt passed the Danish Parliament for the first time in 1973. In the same year the first bridge across a strait with a similar status as the Great Belt was opened in Turkey. This bridge, the Bosporus Bridge, was constructed with a vertical clearance of 64 metres.

Picture No. 15

The Bosporus Bridge has to be passed by all ships to and from the Black Sea, which is surrounded by four nations: the Soviet Union, Romania, Bulgaria and Turkey. Of these, two nations have ports only at the Black Sea — Romania and Bulgaria. The very similar geographical conditions at the Black Sea and the Baltic Sea gave a further indication that a vertical clearance around 65 metres was acceptable to the international navigation.

Picture No. 16

Based on the 1973 Act, the actual designs for the East Bridge were prepared during 1977 to 1978. After a survey of the air draught of the ships that were actually passing through the Great Belt the vertical clearance was stipulated at 62 metres and this clearance was notified to all seafaring nations. Thus, the observations of the actual navigation through the Great Belt indicated that the vertical clearance could be somewhat reduced in relation to what had earlier been assumed. In contrast to this, the observations of actual ship movements indicated that the width of the navigation opening should be increased to provide safe passage. The main span of the cable-stayed option was, therefore, chosen to 780 metres, more than twice that assumed ten years earlier.

Picture No. 17

The first construction work to be carried out in 1977 was the erection of a 70-metre high mast on the island of Sprogø to allow wind measurements at the actual elevation of the bridge girder in the navigation span across the East Channel.

Picture No. 18

To investigate the technical and financial consequences of a further improvement of the navigational conditions, a second design based on a suspension bridge was also prepared in 1977 to 1978. With this bridge, a span of 1,416 metres would be available for the international ship traffic. The final choice between the cable-stayed and the suspension option was never made, as the construction of the Great Belt Link was postponed for five years, by a newly formed coalition government, for economic reasons.

Picture No. 19

After having postponed the construction of the fixed link, improvements in the ferry services were carried out but, despite this, the basic drawbacks of a floating link remained : time-consuming transit, capacity problems at peak traffic and excessive energy consumption.

Picture No. 20

At the time when the designs for the Great Belt Bridge were prepared in 1977 to 1978, work had progressed for some time on major bridges across international straits in Japan. The first of these bridges, the Kanmon Bridge across the Kanmon Straits between the islands of Honshu and Kyushu, had actually been completed already in 1971. The Kanmon Bridge was constructed with a vertical clearance of 61 metres.

Picture No. 21

The following bridges across international straits in Japan were, however, constructed with a vertical clearance of 65 metres. Thus, this clearance is provided under the large bridges across the Bisan Seto between Honshu and Shikoku. In this context, it is interesting to note that the number of ships passing under the Bisan Seto Bridge is about ten times larger than in the Great Belt.

Picture No. 22

A vertical clearance of 65 metres will also be provided under the Akashi Kaikyo Bridge now under construction across the international navigation channel adjacent to the port of Kobe. When opened in 1998, the Akashi Kaikyo Bridge will have the longest free span of any bridge, 1,990 metres. This illustrates the fact that there is a trend towards increasing the free spans for the sake of navigational safety, whereas there is no trend towards increasing the vertical clearance.

Picture No. 23

The Great Belt Project was resumed with the passage of the Act on the Construction of a Fixed Link across the Great Belt in the Danish Parliament in June 1987, and immediately afterwards the design work was initiated. In the 1987 Act it was specified that the link should be constructed in two stages, with the railway link established first, two to four years ahead of the motorway link.

With this political requirement it was indisputable that the railway should pass under the Eastern Channel in a tunnel, whereas both the railway and the motorway most conveniently could cross the Western Channel on a low-level bridge with a vertical clearance of only 18 metres.

For the motorway crossing of the Eastern Channel the Act indicated two options, either a high-level bridge or an immersed tunnel.

Picture No. 24

The East Railway Tunnel will have a total length of 8 kilometres between its eastern portal on the island of Zealand, and its western portal on reclaimed land east of the small island of Sprogø in the middle of the Great Belt.

During 1989 the tunnel ramps were excavated to a depth of 22 metres below the sea level, and at the same time a site factory was ready to start production of the 60,000 concrete segments to be used for the watertight lining around the tunnel tubes.

Picture No. 25

The first of the four tunnel boring machines arrived at the site in May 1990 and initiated the actual boring in August 1990.

The tunnel boring process will continue throughout 1992 and into 1993. Subsequently the finishing works will be performed and test runs carried out before the opening of the railway link in late 1994.

Picture No. 26

The contract for the West Bridge between the islands of Sprogø and Funen was signed in June 1989.

According to this contract the West Bridge will be built as a concrete bridge with a total length of 6.6 kilometres making it the longest combined road and railway bridge in Europe.

Picture No. 27

The entire West Bridge is fabricated in a large site plant situated on the island of Funen close to the bridge site. On this plant the precast concrete elements weighing up to 6,000 tons are being cast on five production lines.

The casting was initiated in the summer of 1990 and it is planned to continue through 1992.

Picture No. 32

Several bridge piers off the coast of Funen have already been installed and before the end of 1991 the bridge will be stretching far out into the Western Channel.

Next Picture

This picture is a very recent picture taken last week and showing the positioning of the first bridge girder in the West Bridge. You will look in vain for this picture in the written material as it was not possible to have it printed in time for inclusion but it illustrates well that the Project is indeed very well under way.

The West Bridge is scheduled for completion in 1993, and the first trains will be running across the bridge in 1994. Three years later, in 1997, also cars will use the bridge.

Picture No. 33

The design work on the motorway link across the Eastern Channel forming the last integral part of the total project was initiated in 1987 and it comprised both a high-level bridge and an immersed tunnel, although priority was given to the bridge option.

For the high-level bridge both a suspension bridge and a cable-stayed bridge, the latter with a span of 780 metres, were investigated.

Picture No. 34

For the immersed road tunnel the hydrographical investigations on the water flow in and out of the Baltic Sea resulted in a tunnel length of approximately 5.3 kilometres, flanked by ramps with a length of up to 1.5 kilometres off the coasts. With these ramps a substantial impact on the local marine environment was unavoidable.

Picture No. 35

With a tunnel length of more than 5 kilometres an elaborate ventilation system had to be used and this required large ventilation ducts to be arranged above the roadway areas.

In all, the immersed tunnel project was far beyond anything that had been built elsewhere, and the cost was significantly higher than for a high-level bridge. Consequently, it was finally decided to exclude an immersed tunnel from further consideration.

Picture No. 36

For the high-level bridge option the preparatory investigations into the problems related to navigational safety clearly indicated that even a span of 780 metres could turn out to be insufficient in a number of situations.

It was, therefore, decided to initiate an in-depth investigation into all aspects related to the passage of large ships under the bridge.

The investigations comprised four different bridges with main spans ranging from 916 metres for this cable-stayed bridge to 1,688 metres for this suspension bridge.

Picture No. 37

An important tool in the evaluation of navigational safety was manœuvring simulations where the ship movements are simulated by a computer that is directed by controls similar to those found on the bridge of real ships.

Picture No. 38

Manœuvring simulations will give a very good basis for the comparison between the different options as they can be tested under exactly the same assumptions regarding wind, current and ship size.

The tracks left by the ships are recorded and plotted so that a subsequent comparative analysis can be performed.

Picture No. 39

Besides the effort to assure safe navigation much emphasis was also laid in achieving that the entire Great Belt Link would not affect the flow of salt water into the Baltic Sea.

This made it necessary to excavate some 6.8 million cubic metres from the sea bottom immediately east of the Sprogø island as compensation dredging.

Picture No. 40

The final result of the many thorough investigations became an East Bridge with a record-breaking main span of 1,624 metres.

Within this span a vertical clearance of 65 metres will be available over a width of 750 metres for the loaded bridge at high temperatures, i.e., in the condition when the bridge girder is at its lowest elevation.

At a temperature of 10 degrees C the unloaded bridge will show a vertical clearance of 71 metres at midspan so it was not correct, as mentioned yesterday, that 65 metres is an upper limit that can go down as far as 60 metres under unfavourable conditions. On the contrary, 65 metres is a clearance under unfavourable conditions, under favourable conditions it is about 5 metres higher.

Picture No. 41

With the chosen span of 1,624 metres it was concluded by the pilots involved in the manœuvring simulations that the navigational conditions in the Great Belt would actually be improved after completion of the fixed link. This was partly due to the wide opening and partly to the termination of the intense ferry services across the Belt.

Picture No. 42

The navigational conditions will be further improved by a straightening of the T-route so that the bends will be located further away from the bridge alignment and involve a small change of direction, so the original route was the one shown with a dotted line here and the straightened route is the one with a solid line going up here.

Picture No. 43

The contract for the construction of the East Bridge Project is planned to be signed at the end of August 1991, and six years later, in 1997, the bridge is scheduled to be opened to traffic.

However, already in 1990 a number of preparatory works for the East Bridge have been carried out. Among these was the construction of a 25-metre high embankment that will form the western ramp of the bridge on the island of Sprogø.

Picture No. 44

When completed in 1997 the Great Belt Link will be the largest combined road and railway link in the world.

Thus, it will be more than twice as long as the San Francisco-Oakland Bay Bridge from the 1930s and more than 50 per cent longer than Seto Ohashi in Japan from the 1980s.

Picture No. 45

It is to be expected that the Great Belt Link will be followed by a fixed traffic link across the Sound between Denmark and Sweden.

For this link the western part on the Danish side will be constructed as an immersed tunnel, positioned below the sea bottom, so that the water depth in the deepest navigation channel will remain at the present 7.7 metres.

This depth is the minimum depth at mean sea-level and it is only slightly influenced by wind and current and certainly not in the same magnitude of 2 metres as found in route T.

Picture No. 46

From the examples mentioned earlier it appears that the East Bridge of the Great Belt link is in accordance with other bridges of similar importance for international navigation. This statement also applies to bridges that are planned to be constructed in the future.

Thus, in a few years' time, it is expected that the Italians will start the construction of a bridge across the Strait of Messina between the continent and the island of Sicily.

For this bridge, the International Maritime Organization (IMO) has already been notified that the vertical clearance will be 65 metres, which is the same as chosen for all major bridges in the last three decades.

Picture No. 47

Also an even larger bridge — across the Strait of Gibraltar — is likely to reach the construction stage within a few decades.

The Gibraltar Bridge is also planned to have a vertical clearance between 60 and 70 metres, corresponding to the established international standard.

Picture No. 48

In the design of the Great Belt Link both the navigational safety of the international ship traffic and the effect on the marine environment of the Baltic Sea have been carefully considered.

This has been done to such an extent that the conditions are even improved for the 22,000 ships that are going in and out of the Baltic Sea.

Furthermore, it has been assured that the bridge will only imply a height limit that has already been accepted across many other waterways of similar importance and — until now — been accepted by each and every country in the world.

For the marine environment it is assured that there will be no change in the salinity and oxygen content of the Baltic Sea as a consequence of the construction of the fixed link.

Never before have these aspects been considered so conscientiously when designing and constructing a major bridge and tunnel link.

With these closing remarks, I thank you for your attention.

The Court adjourned from 11.25 to 11.45 a.m.

ARGUMENT OF MR. JIMÉNEZ DE ARÉCHAGA

COUNSEL FOR THE GOVERNMENT OF DENMARK

Mr. JIMÉNEZ DE ARÉCHAGA : Mr. President, Members of the Court, I have the honour of addressing the Court, supplementing Denmark's Written Observations, in order to examine the question whether the special right of passage Finland has invoked really exists and really deserves the provisional protection which has been requested from the Court.

This right of passage, as claimed by Finland, is a special one because it has three extraordinary characteristics. It is absolute, since Finland does not recognize the existence of a conflict between its claim with the rights of Denmark as a territorial sovereign. It is unlimited, since no upper limit of height is indicated for the bridge. Finally, it is an expanding or elastic right, because it will increase in its dimensions so as to correspond to the height of future, foreseeable platforms and other structures.

It seems legitimate to consider this basic question at the present stage, because the existence of the right claimed by the Applicant constitutes one of the circumstances, perhaps the most important one, to be taken into account in determining whether interim relief should be granted or refused.

That is why Article 41 of the Statute states that any provisional measures are to be taken "to preserve the respective *rights* of each party". And the 1972 Rules of Court required that the request shall specify "the rights to be protected", a requirement which remains implicit in the present Rules.

Yesterday, my friend, Sir Ian Sinclair, placed himself in a comfortable position. At the beginning of his statement he said that the whole case of Finland is based on its rights of passage through the Danish Straits. He added that this free passage constitutes "the right to be preserved", to which Article 41 of the Statute refers.

Yet, at the end of the morning, he stated that we cannot anticipate and discuss now the existence or the scope of the right he invoked ; that that discussion is for another day, not to be examined at the present stage of the proceedings but when the Court comes to consider the merits of the case.

This is a very comfortable position to take, but an untenable one : to invoke a right but refuse to discuss now its existence and its scope. The Court seems to be asked, then, to accept blindly, as an absolute presumption, that the right of passage exists with all the claimed special characteristics.

Also, this refusal is incompatible with the position which was taken by the Agent for Finland, Ambassador Grönberg, who said yesterday that Finland wishes to "possess an authoritative statement on what our respective rights in this matter are. This is what we have come to seek from the Court. We seek, first, a declaration of our rights in this matter." (CR 91/9, p. 26.)

In consequence, Mr. President, with your permission, I shall examine the question whether the right claimed by Finland, with the extraordinary characteristics I have indicated, really exists. As a prominent counsel once said : "you may be glad to hear that I shall present a pure point of law, uncorrupted by any facts".

Inapplicability of Part III of the 1982 United Nations Convention on the Law of the Sea

In support of its alleged right, Finland has invoked two instruments — the 1857 Treaty of Copenhagen on the Abolition of the Sound Dues and the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone. However, in the Application, paragraph 25, Finland refers also to a third instrument in the following terms: "so far as applicable . . . the transit passage régime of the 1982 United Nations Convention on the Law of the Sea".

This invocation of Part III of the 1982 Convention was made even more clear in a statement made yesterday by Ambassador Grönberg, who said:

> "The Third United Nations Conference on the Law of the Sea, as is well known, further strengthened this régime by adopting the notion of 'transit passage', written into Articles 37 to 44 of the 1982 United Nations Conference on the Law of the Sea." (CR 91/9, p. 16.)

The Danish Government is astonished to find this invocation by Finland of Part III of the 1982 United Nations Convention.

It is astonished because Finland's authorities must know well, perhaps better than anybody else, that Part III of the 1982 Convention is not applicable to the Danish Straits, as it is not applicable either to the Aaland Straits, according to Article 35 of the 1982 Convention. This Article provides, under the title "Scope of this part" that:

> "Nothing in this part affects:
>
> *(c)* the legal régime in straits in which passage is regulated in whole or in part by long-standing international conventions in force specifically relating to such straits."

All the writers who have dealt with the subject of straits under the 1982 Convention, I will mention them, agree that examples of conventional régimes which qualify under Article 35 *(c)* are the Turkish Straits (Dardanelles and Bosporus), the Danish Straits, the Strait of Magellan and the Finnish Aaland Straits (H. Caminos, "The Legal Régime of Straits in the 1982 Convention on the Law of the Sea", *RCADI*, Vol. 205 (1989-V), pp. 130-131; J. N. Moore, *American Journal of International Law*, 1980, p. 114; Treves (ed. Dupuy-Vignes), *Traité du nouveau droit de la mer*, pp. 790-791; J. A. Yturriaga, *Straits Used for International Navigation*, 1991, p. 292).

As a directly concerned Strait State, Finland should have mentioned the non-applicability of Part III to the Danish, as well as to the Finnish, Straits. Such an omission is even more difficult to understand when one recalls the role that Finland played, as a protagonist, together with Denmark, in the origin of Article 35 *(c)*, which excludes the right of transit passage from both their strait régimes.

We have mentioned in our Written Observations that, on 22 July 1974, in Caracas, Denmark and Finland co-sponsored an amendment to United Kingdom proposal which had the effect of excluding from the novel concept of transit passage the Danish and the Finnish Straits and in that respect it was the original source of Article 35 *(c)*.

With your permission, Mr. President, I will read parts of the statements made by the representatives of Denmark and of Finland, in submitting their joint amendment.

The representative of Denmark, Ambassador Fergo, pointed out that his country, as a seafaring nation with international straits within its territorial waters, was concerned with the rules applicable to international straits. The existing rules governing innocent passage through the territorial sea, which were codified in the Convention of 1958, were the result of a delicate balance between the different interests of the coastal State and international navigation. Consequently, there was no need to revise the present régime of innocent passage through international straits. A general agreement establishing maximum limit of 12 miles for the territorial sea would, however, result in the creation of a large number of new straits overlapped by the now extended territorial sea. In the case of new straits up to a breadth of 24 miles, there might be a need for a new régime of free transit passage. On the other hand, his delegation failed to see the need to change the rules of innocent passage through straits less than 6 miles wide, where the right of free passage and overflight had never existed. The problem could be solved, in the opinion of the Danish delegate,

> "by maintaining the existing rules of innocent passage through international straits of less than 6 miles and establishing a new régime of transit passage through new wide straits, which would emerge as a result of establishing a maximum limit of 12 miles for the territorial sea".

That was the standing of the Danish representative.

A similar view was expressed by the representative of Finland, Judge Manner, who noted that none of the texts submitted so far has made an express exception for circumstances where the breadth of the territorial sea in a strait connecting two parts of the high seas will remain unchanged, in spite of the new provisions, and where the prerequisites for transit passage would thus also remain unchanged. In such straits, the provisions concerning innocent passage were applicable and could be applied also in the future. The situation had not changed, therefore, there was no reason to require the opening of such a strait to free passage. Neither fishing nor other peaceful uses of the sea required the proposed change in the status quo of straits traditionally used for international navigation based on the rules of innocent passage.

A particular solution would be — in the opinion of Judge Manner — "to provide that the minimum breadth of straits in which freedom of passage would apply should be 6 nautical miles" (Yturriaga, *op.cit.*, pp. 116-117).

In the light of the history of Article 35 *(c)*, to invoke Part III of the 1982 Convention, as Finland has done, is either an egregious mistake or a subconscious admission that the two applicable instruments, the 1857 Treaty and the 1958 Geneva Convention, are not sufficient to support the unlimited right of passage claimed by Finland. One explanation for this "faux pas" may be that Finland realized that only the broader and more liberal transit passage régime would give legal support to the absolute, unlimited and elastic right it is claiming before the Court.

Another corollary to infer from the co-sponsored proposal is that it demonstrates that in 1974, one year after the adoption of the 1973 Danish Law concerning the building of a bridge across the Great Belt with a clearance of 62 metres, in 1974 in Caracas, Finland was perfectly satisfied with the status quo and did not feel the necessity of extending to those straits the more liberal régime of transit passage.

THE 1958 GENEVA CONVENTION

The 1958 Geneva Convention on the Territorial Sea, on the contrary, is fully applicable since both Denmark and Finland have ratified it.

But, as indicated in Denmark's Written Observations, the 1958 Convention only contains a single provision concerning specifically the régime of straits, that in paragraph 4 of Article 16, forbidding suspension of the right of passage in straits used for international navigation. This provision, a part of customary law as defined by the International Court of Justice in the *Corfu Channel* case, is not relevant to the present dispute.

While the 1982 Convention on the Law of the Sea proclaims in Article 38 a right of transit through straits as a distinct and independent right, there is no equivalent or similar right proclaimed in the 1958 Convention. Passage through straits is subsumed in the régime of innocent passage through the territorial sea.

This basic difference between the respective instruments has important consequences as to the scope of the right of passage and as to the interpretation of the relevant provisions of the two conventions.

In the 1958 Convention the determination of when the passage is innocent is left in large measure to the discretion of the territorial State, which is, after all, acting in its own territory. At the third UNCLOS the maritime States, interested in a more liberal and secure right of passage, levelled serious criticism of what they called the ambiguities and inadequacies of the régime of passage through straits in the 1958 Geneva Convention.

These ambiguities and inadequacies were analysed in depth at the Conference and the consensus reached there was to proclaim in Article 38 a novel right of transit passage through straits based on the principle of freedom of navigation.

I know I am repeating to the Court what its Members know better than me, for many of them have taken very distinguished part in the negotiations or have followed them closely. Anyway, my duty compels me to summarize the main differences which result from the comparison between the right of transit passage in the Jamaica Convention and the "innocent passage" in the Geneva Convention of 1958.

Leaving aside the passage of warships, submarines and aircraft, an important difference is that in the Geneva Convention the coastal State has direct enforcement powers over foreign ships and, as Article 16 (1) says, it "may take the necessary steps in its territorial sea to prevent passage that is not innocent".

This provision was described at the Conference by the representatve of the United States, J. N. Moore, as "the most indicative of an intent to give coastal States certain rights to take unilateral action to prevent non-innocent passage" (J. N. Moore, *op. cit.*, p. 102).

This direct enforcement power over a foreign ship had disappeared in the 1982 régime of transit passage, where, as described by Caminos (*op. cit.*, p. 169)

> "ships in transit cannot be seized, refused passage, subjected to inspection or any other type of control that would impair transit passage. The only exception is when the violation causes or threatens major damage to the marine environment. Then, and only then, may the State bordering the strait 'take appropriate enforcement measures under Article 233'."

Another most important difference relates to the scope of the regulatory competence enjoyed by the coastal State.

According to the Geneva Convention the bordering State has a broad prescriptive power to issue laws and regulations defining and governing what constitutes "innocent passage". Again J. N. Moore, representative of the United States at the Conference, referred to "the uncertain and imbalanced coastal State regulatory competence provided by the 1958 Convention in Articles 14, paragraphs 5 and 17" (*op. cit.*, p. 116).

In his view the main criticism addressed to the Geneva Convention was "the subjectivity inherent in the definition of innocent passage" (*op. cit.*, p. 116).

A comparison of the scope of this regulatory competence shows that in 1982, for the transit passage, the prescriptive power of the coastal State has been drastically reduced.

For instance, Article 42, paragraph 1, of the 1982 Convention enumerates exhaustively the subject-matters which may be regulated by the littoral State: safety of navigation, fisheries, control of pollution, control of customs and immigration. And also, in respect to certain subjects, the coastal State is obliged to give effect to applicable international regulations and in some cases these regulations have to be agreed by the competent international organization.

On the other hand, the 1958 Geneva Convention grants the territorial State a broad power of regulation, without the need to refer only to certain subject-matters and without demanding conformity with international norms or recommendations.

Thus, the broad regulatory competence of the territorial State may include the fixing of reasonable clearance limits for the floating equipment which intends to navigate its straits. The regulations as to innocent passage that have been issued by Denmark in the exercise of its regulatory power are undoubtedly restrictive but fully reasonable.

They take into account the introduction, in respect of innocent passage, of the new notion of "special characteristics of particular ships" as a ground justifying a non-discriminatory but different treatment for certain categories of ships. This notion, introduced in Part II of the 1982 Convention, is designed to take due account of scientific and technological developments which have occurred in recent years. These changes required the adoption of appropriate rules to regulate navigation of certain ships with special characteristics.

Among these are mentioned in Article 23 in Part II of the 1982 Convention nuclear powered ships and ships carrying nuclear or other inherently dangerous or noxious substances.

Although tankers are not expressly mentioned, H.E. Judge Oda has pointed out in his comprehensive account of the work of the Seabed Committee, that tankers also fall within the category of "ships with special characteristics" (*The Law of the Sea in Our Time, II, The United Nations Seabed Committee, 1968-1973*, Sijthoff, Leiden 1977, p. 247).

According to this authoritative opinion the reference to ships of special characteristics envisages the applicability of differential treatment to certain categories of ships, such as tankers and also, why not, to oil rigs when carrying platforms or other additional structures.

Obviously, the Finnish oil rigs and similar artefacts, even if they were considered ships, would fall within the non-exhaustive category of ships with special characteristics, requiring special treatment for their passage.

Consequently, it may be affirmed that those structures, once installed, do not possess the absolute, unlimited and expanding right of passage claimed by Finland.

These exceptional structures and platforms cannot have all obstacles up to 170 metres high magically disappear at their passage. If their builders want them to pass through the Great Belt, they should erect their additional gear, "towers, columns, jack-up legs, etc." after having passed below the bridge.

Coming back to another difference between the 1958 and the 1982 régime, it is to be remarked that the 1982 Convention in Part III recognizes the right of transit passage "to all ships and aircraft".

It has been well said that

> "This granting clause in the 1982 Convention, the most important phrase from the standpoint of the user State, makes no distinction between categories of ships and aircraft, their nationality or ownership, their status as warships or merchant ships, or civil or State aircraft. The right of transit passage [in Part III] applies literally to all types of ships and aircraft, regardless of their individual characteristics." (Caminos, *op. cit.*, p. 144.)

All this cannot be said of the 1958 Convention. This fundamental difference is reflected in the terminology employed : innocent passage for *ships of all States* that is what is said in the 1958 Convention. In 1982, the transit passage is for *all ships and aircraft*.

This striking difference as to the placement of the word "all" in the definition of the right of passage between the two Conventions, has a significance of its own, in the carefully considered terminology of both Conventions. It signifies that, for the application of Article 38 of the 1982 Convention, among the various interpretations given to the word "ship" in different Treaties, a wide interpretation of that term is to be applied, since the text refers to "all ships".

On the contrary, Article 14 of the 1958 Convention, refers merely to "ships of all States". Consequently, a restrictive interpretation of that term "ship" is called for, taking into account not only the different terminology utilized, but also the principle that restrictions to the sovereignty of the State over its own territory, submerged or not, cannot be presumed and must be strictly interpreted.

The corollary to extract from this comparative study of the two Conventions is that the discussions and conclusions at the Conference revealed the deficiencies and inadequacies of the 1958 Convention in which Finland supports its claim. States, in particular the maritime powers, were legitimately concerned with the possibility that coastal States could deny "innocent passage" through straits used for international navigation based on matters such as flag, cargo or destination of the vessels. It may be said, borrowing a classic expression of Professor Gidel, the great specialist on the Law of the Sea, that the fallen idol of the Conference was the "innocent passage" régime, which was considered absolutely insufficient and defective. Caminos rightly states : "Both the definition of innocent passage in the 1958 Convention and its enforcement criteria lacked the precision and guidance desired of any legal norm."

Caminos adds :

> "The defeat of the régime of innocent passage in straits codified in the 1958 Convention resulted from its failure to provide objective criteria with which to judge the 'innocent' component of the concept. Innocent passage, as codified, gave too much discretion to the coastal State and too little guidance to maritime States." (Pp. 105 and 140-141.)

So the answer of the Conference was to proclaim a separate and distinct "right of transit passage" including the reference to the concept of "freedom of navigation and overflight".

The negotiations and the conclusion reached at the Third United Nations Conference on the Law of the Sea reveal, *a contrario*, as a negative photograph would, the imperfections of the rights that may be derived or invoked on the basis of 1958 Convention.

Consequently, it is difficult to infer from the 1958 Convention the absolute, unlimited and expanding right claimed by Finland.

All there is is an imperfect right of "innocent passage" through the territorial waters of Denmark, subject to all the reservations and restrictions the Conference has made manifest.

CUSTOMARY LAW?

Finland's Application asserts that "account will also have to be taken of customary law relating to free passage through international straits".

Ambassador Gronberg also stated yesterday that:

> "though the (1982) Convention is not yet in force, a good case can be made that this notion (of transit passage) has already become a part of customary international law".

I beg to disagree. No good case can be made to that effect.

If this assertion signifies that the régime of transit passage regulated in Part III of the 1982 Convention might be applicable in this case as emerging customary law, rather than the 1958 Convention, the negative answer is very simple.

Such a substitution cannot take place between States parties to the 1958 Convention, as in the case of Denmark and Finland. Article 311 (1) of the Jamaica Convention provides "This Convention shall prevail, *as between States parties*, over the Geneva Convention on the Law of the Sea of 29 April 1958."

So it is necessary to become a party to the 1982 Convention for the substitution to occur. From a more general point of view as to customary law, I would add the following concerning the two elements of customary law.

I do not wish to enter into the delicate question of whether the actual practice of States corresponds to the provisions of Part III of the 1982 Convention. On this question both Caminos and Yturriaga reach negative conclusions. But I do not want to go into that. It is sufficient for our purposes, to point out that the insertion of Article 35 *(c)* supported and proposed by Denmark and Finland, demonstrates the total absence of *opinio juris* in the consensus of the Conference, in respect to extending to the Danish and the Finnish Straits and other historic straits the legal régime in Part III of the Jamaica Convention. They wanted to exclude those Straits from the régime of transit passage and they did. This rules out completely the possibility of emergence of Part III as a customary law, in respect of the excluded straits.

The 1857 Treaties and Finland's Position in Respect to Them

As it results from Article 35 *(c)* of the 1982 Convention on the Law of the Sea the Danish Straits are governed by two treaties of long standing. These are the Treaty for the Redemption of the Sound Dues between Denmark and other 12 parties, signed at Copenhagen, on 14 March 1857, and the separate bilateral Treaty between Denmark and the United States, signed at Washington D.C., 11 April 1857, for the same purpose.

Finland is not one of the parties to these agreements. It may however invoke the right of passage guaranted by the 1857 Treaties, as a third party beneficiary, in accordance with Article 36 of the Vienna Convention on the Law of Treaties. It might be said that Finland is not merely a third party beneficiary because it inherited, as successor of Russia, the rights Russia derived from the 1857 Treaty. But Finland, when becoming independent in 1917 declared that it was not bound by the treaties concluded by Russia (E. Castren, "Aspects récents de la succession d'Etats", *RRCADI*, Vol. 78 (1951-I), p. 409). Consequently, if it was not bound it could not invoke the rights. Lord McNair, a great authority on the subject, states in his Law of Treaties (p. 605) that in the case of Finland there was no succession concerning the rights derived from pre-existing Russian treaties.

He indicates that in this case the parties proceeded to apply what today is described as the principle of *"tabula rasa"*.

Lord McNair says :

> "Accordingly, the two Governments [the United Kingdom and Finland] proceeded to study the treaty obligations existing (though in suspense) between the United Kingdom and Russia, and to negotiate and conclude such new treaties as they considered to be necessary between themselves." (*Law of Treaties*, p. 605.)

The same attitude was adopted by Denmark in its treaty relations with Finland upon its independence in 1917.

Consequently the status of Finland with respect to the 1857 Treaty is that of a third party beneficiary.

However, as a third party beneficiary Finland cannot claim nor exercise additional or more extensive rights than those enjoyed by the actual parties to the treaty. The parties to the 1857 Treaty have accepted a clearance of 65 metres as being sufficient for the exercise of their right of passage through the Danish territorial sea. Finland cannot invoke additional rights or a more favourable treatment than the one agreed to by the actual parties to the 1857 Treaty.

As stated in Denmark's Written Observations, there cannot be two different measures for the right of passage : an elastic one for Finland, eventually more than 180 metres high, another for the parties, 65 metres high.

The above consideration is based on the letter and the spirit of Article 36 of the Vienna Convention on the Law of Treaties, an article which deals with "treaties providing for rights for third States". According to paragraph 1 of this article "a right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord *that right*" to the third State (emphasis added). So, what is granted to the third State is exactly the same right which was obtained by the parties to the treaty, in this case a clearance up to 65 metres. The subordination of the right of the third State to the actual conditions obtained by the parties is further confirmed by paragraph 2 of the same Article 36 of the Vienna Convention on the Law of Treaties, which provides that "a State exercising a right in accordance with paragraph 1 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty".

Once Denmark establishes as the condition for clearance a height of 65 metres, in exercise of the broad regulatory competence over its territorial waters and this regulation is accepted by the other parties to the treaty, as it has been accepted, then such a regulation becomes binding on Finland, as a condition "established in conformity with the treaty", and not as an unlawful restriction of its rights.

Scope of the 1857 Treaty

To define the scope of the 1857 multilateral Treaty, attention must be paid to its object and purpose, according to the rules of interpretation in Article 27 (1) of the Vienna Convention on the Law of Treaties.

The object of the 1857 Treaty is defined in the Treaty itself in the following terms : "to facilitate and to increase the commercial and maritime relations at present existing between the contracting States or through them" by means of "the complete and permanent removal of all dues levied on foreign ships and their cargoes on their passage through the Sound and the Belts".

From this definition of the object and purpose of the 1857 Treaty it results that its provisions have in mind merchant vessels, since the text refers to "foreign ships and their cargoes" and also refers to "commercial relations". The oil rigs and drilling platforms do not transport cargo or passengers since they remain stationary at the same place over long periods of time.

They can hardly be described as "merchant ships" and therefore do not have a perfect right of passage with the three characteristics we have described.

Obviously, the 1857 Treaty, applicable only to "merchant ships" is more restrictive than the régime of the 1958 Convention and of course that of the 1982 Convention.

This difference in the more or less liberal position concerning the passage of different categories of ships is no obstacle to the application of the long-standing Convention of 1857, exempted from Part III of the 1982 Convention (Art. 35 *(c)*).

The scholars who have studied the régime of straits under the 1982 Convention coincide in affirming that :

> "if a convention of long-standing exempt by Article 35 *(c)* calls for the application of a more restrictive régime than would be applied under the 1982 Convention, the more restrictive régime would take precedence" (Prof. Caminos, *op. cit.* p. 135 ; cf. Prof. Treves in R. S. Dupuy and A. Vignes, *Traité du nouveau droit de la mer*, p. 793).

CONCLUSION

In conclusion of this part, I wish to reiterate the conclusions formulated in the part concerning the law in Denmark's Written Observations. Denmark accepted in 1857, in response to the interest of the international community in free maritime navigation and trade, certain well-defined limitations to its sovereign rights.

It would not be fair and reasonable to interpret the long-standing commitments assumed in 1857 as imposing now, upon Denmark, a permanent, new and expanding servitude *non edificandi* over its own territory which would prevent its economic progress and impede the public works required for the well-being of its population.

Thank you, Mr. President, for your attention and courtesy.

ARGUMENT OF MR. FERGO

AGENT FOR THE GOVERNMENT OF DENMARK

Mr. FERGO: Mr. President, Members of the Court, let me begin with expressing my satisfaction at addressing the Court in a matter of great importance to the Danish people.

In its request to the Court for provisional measures, Finland states in paragraph B.4 that in building a bridge across the Great Belt, Denmark excludes ships over 65 metres height, including drill ships and oil rigs from enjoying the right of free passage.

I would like to show that this is not so. Denmark has made very thorough studies of the air draught — this is a technical term to indicate the height above the water — of merchant ships passing to and from the Baltic Sea. This study was carried out by the internationally recognized Classification Society "Det Norske Veritas" whose latest report of March 1989 is submitted to the Court as Annex 10 to the Written Observations submitted by the Government of Denmark.

As it appears from paragraph 3 of that document, there are no merchant ships in existence — be it dry cargo vessels, tankers, passenger ships, ferries, sailing ships, ice breakers or fishing factory ships, that would be prevented from passing under a bridge of 65 metres clearance across the Great Belt. In fact, figure 1 on page 10 of the report shows that approximately 99 per cent of all ships in transit through the Great Belt have an air draught of less than 40 metres.

The offshore categories are treated in paragraph 4 of the report from Det Norske Veritas. However, it is the contention of Denmark that offshore constructions with their extreme heights cannot enjoy an absolute right of unhampered passage through the Danish Straits.

In paragraphs 25 and 26 of its Application, Finland refers to three instruments governing the passage through the Danish Straits: the 1857 Treaties of Copenhagen on the Abolition of the Sound Dues, the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone and the 1982 United Nations Convention on the Law of the Sea.

As it is pointed out in the Danish Government's Written Observations, paragraphs 97 to 99, and in the presentation just made by Dr Jiménez de Aréchaga, the transit passage régime in Part III of the 1982 United Nations Convention on the Law of the Sea, which by the way has not yet been ratified neither by Denmark nor by Finland and is not yet in force, does not apply to the Danish Straits pursuant to Article 35 *(c)* of the Convention, which retains the existing régime of passage through straits in which passage is regulated in whole or in part by long-standing international conventions in force specifically relating to those straits.

The 1857 Treaties of Copenhagen are an example of such long-standing conventions which, by their very nature and purpose, aim at merchant ships. As I have already pointed out, based on the report of "Det Norske Veritas", all merchant ships can pass under a bridge of 65 metres clearance. Clearly, these Treaties do not regulate the passage of offshore constructions through Danish straits nor does the Geneva Convention of 1958 deal with this question.

From all that I know about the preparations for and discussions under the United Nations First Conference on the Law of the Sea this problem was not considered. All the relevant provisions of the 1958 Convention relate to normal navigation and nothing else.

Since the adoption of the 1958 Geneva Convention there have, of course, been major developments in the law of the sea. Even so, the Final Act of the Third United Nations Conference on the Law of the Sea of 1982, Part II, Section 3, on innocent passage in the Territorial Sea and Part II, Section 2, on Transit passage uses exactly the same term as the Convention on the Territorial Sea of 1958, namely "ships".

Although platforms had come into general use at the time of the negotiations in the Third United Nations Conference on the Law of the Sea no attempt was made to change the wording from that used in the First Conference. On the contrary, in defining the meaning of "dumping" in Article 1 (5) *(a)* of the Final Act a distinction is made between vessels, aircraft, platforms and other man-made structures at sea. There would have been no need to mention platforms specifically if they were understood to be included in the term "vessel".

In fact no proposal was ever put forward in the Third Conference with the intent to place offshore constructions on an equal footing with ships as far as passage through international straits is concerned. The consequence of such a proposal would have been to exclude the right to build bridges across international straits because it is impossible to build bridges high enough to accommodate constructions of such extraordinary height.

As pointed out in the Danish Government's Written Observations under Part I, F, several countries had already at the time of the beginning of the Third Conference built bridges of a height at 61-64 metres over such straits. These constructions had met with no objections from the international community.

The intention of the Danish Government to follow this example was made quite clear to the Third United Nations Conference on the Law of the Sea by the Danish delegation, in an intervention on 22 July 1974, when it opposed a proposal forbidding the placing of any installation in straits which would interfere with the passage of ships. This proposal was not included in the text of the Final Act. I would like to refer the Court to paragraph 122 of the Written Observations, where you will find an account of the intervention of the Danish delegation on that occasion, taken from the summary records of that meeting.

It is inevitable that the Danish delegation to the Third United Nations Conference on the Law of the Sea would have had to react in a similar way, had any other delegation proposed to give offshore constructions the same right of passage through international straits as ships, in view of the consequences this would have had for the Danish Government's plans to build bridges to connect the various parts of Denmark separated by geography.

In short, I would like to stress that I have not been able to find any provisions in international law to the effect that offshore constructions should have the right to pass through international straits unhampered by bridges.

In some international conventions relating to the protection of the marine environment, it is stated that the term "ship" or "vessel" includes floating craft or platforms, whether self-propelled or not. Reference is made, *inter alia*, to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matters, done in London on 29 December 1972 (Art. III (2)), and the Convention on the Prevention of Marine Pollution by Dumping from Ships and Aircraft, done at Oslo on 15 February, 1972 (Art. 19 (2)). In order to serve the purpose of conventions aiming at the protection of the marine environment, it is logical that they should include all potential sources of pollution, but it is equally clear that, in order to ensure the inclusion of platforms into the term "ship" or "vessel", this has to be expressly stated in the text of the particular convention.

The conclusion of this part of my remarks is that international law does not contain any definition of the term "ship" and that the interpretation has to be decided on a case-by-case basis. In relation to the Danish straits, no rule exists that obliges Denmark to take into account the height of offshore units when constructing a bridge across these straits.

I would now like to comment on various types of mobile offshore drilling units, which are the subject of the dispute in the present case. For this purpose, may I draw the attention of the Court to the drawing on page 16 of the Written Observations submitted by Denmark.

There are three main types of offshore drilling units: drill ships, semi-submersible drilling platforms and jack-up drilling platforms.

It is a common feature for all three units that there is a floating construction, either a ship or a platform, on top of which is fixed drilling equipment intended to drill wells for exploration of hydrocarbons.

The Danish Government does not object to the passage of these units through our straits, but we maintain that, if the drilling equipment is too high to pass under a bridge with a vertical clearance of 65 metres, which is a standard height for most large bridges in the world, then this equipment must be dismantled before the passage and assembled afterwards. This should not present any practical problems as far as the drill tower — the so-called derrick — is concerned. For jack-up platforms the legs present an additional obstacle if they have to pass a bridge fully assembled. In this case, it would be possible to wait with the assembly of the legs, or part of them, until the bridge has been passed. This procedure is used for many jack-ups during longer transportation, to ensure stability during navigation. This is a less complicated procedure than indicated in the Finnish Application, because the legs may be built in sections which can be added to one another.

If we take a look at the specific types of *drill ships* which Rauma-Repola Offshore Oy has constructed up to now, we note from Finland's Application, paragraph 17, that they have a transit draught of 7.3 metres. In paragraph 10 of Finland's request for provisional measures, it is indicated that the only deep-water route between the Baltic and the North Sea traverses the Great Belt.

However, as is well known to all seafaring nations, there is another route from the Baltic to the North Sea, through the strait between Denmark and Sweden, the Sound. The official depth of this sea lane at its most shallow point — the Drogden — between the islands of Amager and Saltholm, near Copenhagen, is 7.7 metres. The sea lane is 290 metres wide and has a length of about 6.5 kilometres. It should be possible for offshore constructions to use this route with the necessary planning and care during passage. The drill ships which Rauma-Repola Offshore Oy has built until now — and I understand that we are talking of three ships — could all pass through the Sound. For further details about this sea lane, I would like to refer to Part I, Section D, of the Danish Government's Written Observations. It must be stated that the depth of 7.7 metres is the *minimum* depth of the Drogden. Yesterday Finland indicated that this depth might be reduced by 2 metres. This is a misunderstanding. The fluctuation of 2 metres in the water depth applies to the Great Belt but not to the Drogden.

At this point, I would also like to stress that, even if and when a fixed link is constructed between Denmark and Sweden across the Sound, there will be no impediment to continued passage through the Drogden. The projected fixed link across the Sound will, on the Danish side, consist of an immersed tunnel. This is the only possible solution, due to local factors, including the proximity of Copenhagen International Airport.

If we now take a look at the platforms, I would like first to talk about the type called *jack-ups*. As I have already mentioned, it is not unusual for this kind of platform to have the top sections of its legs attached after it has been transported close to its site of operation.

However, even if these constructions are completed in advance in such a way that they cannot pass under a bridge of 65 metres elevation, the draught of jack-ups will allow them to use the route through the Drogden.

I would like again to draw your attention to Annex 10 to the Written Observations submitted by Denmark, containing the report from "Det Norske Veritas". In this Report, on page 8, in paragraph 4.3, there is a table of some typical jack-ups, most of which have a draught of between 4 and 5 metres and only one of 7.3 metres. Reference is also made to Annex 15 to our Written Observations, where the list of Rauma-Repola's production demonstrates that the jack-ups produced by the Finnish yard have a transit draught of 6.5 metres. Therefore, they should all be able to be towed through the Drogden.

I have talked about drill ships and jack-ups produced until now by Rauma-Repola Offshore Oy which, according to the information we have been able to gather from the authoritative sources mentioned in Annex 15 to our Written Observations, should all have been able to pass through the Drogden.

I now turn to the third type of offshore construction, the *semi-submersible*.

Again, you will find a drawing of this construction on page 16 of the Written Observations submitted by Denmark. This is a floating unit with a derrick, usually higher than 65 metres. As I have explained earlier, this construction cannot be compared to a merchant ship which can claim an absolute right of passage through the Danish straits. It is an industrial design put on top of a platform and if the construction is too high to pass under a bridge of an elevation which corresponds to the normal height of bridges around the world, including bridges over international straits, then some modification to the derrick must be made during passage.

However, according to the information submitted in Annex 15, the semi-submersibles built in Finland should also have a draught to enable most of these constructions to pass through the Drogden.

I am of course aware that Finland in its Application, paragraph 14, maintains that "the draught of some of the ships including oil exploration and production rigs and drill ships is up to 15 metres".

This is a very imprecise description of the draught of the Finnish offshore constructions. It is immediately contradicted in paragraph 17 which states that the drill ships delivered have had a draught of 7.3 metres.

As far as semi-submersibles and jack-ups are concerned my first comment is again that Denmark does not consider these platforms to have an unconditional right of unimpeded passage through the Danish straits. As to the draught of these platforms it is mentioned in paragraph 17 that semi-submersibles have a transit draught of up to 15 metres. But as I have already explained we believe that most if not all of the semi-submersibles produced at Rauma-Repola Offshore Oy have a draught which should have allowed them to pass through the Drogden. Finland has not substantiated its claim for a required free depth of 15 metres.

Finally, Finland states in paragraph 17 of the Application that jack-ups have had a draught of up to 10 metres or more when transported by heavylift vessels. But it is important to note that it is not the jack-up itself which has a draught of 10 metres. On the contrary as I have already explained the jack-ups produced by Rauma-Repola Offsore Oy have a transit draught of 6.4 metres when towed, and to the best of our knowledge they could have passed through the Drogden.

It is only when these constructions are placed upon heavy lift ships that the draught would be too deep for passage through the Drogden.

Of course, Finland maintains that jack-ups are ships, but I submit to you that it is an unusual kind of ship that has to be placed upon another ship or towed by another ship in order to be transported. In any event it should be possible to tow the jack-up through the Drogden and if necessary put it on its transport ship after passage if it cannot continue under tow.

To sum up the information we have been able to gather about the Finnish Company Rauma-Repola Offshore Oy's production of mobile units over the period 1974-1990 we have prepared a list which, as already indicated, appears as Annex 15 to the Written Observations. This list corresponds to the sales folder from Rauma-Repola enclosed as Annex 16 which contains pictures of the constructions in question.

The conclusion we have drawn from this material is that the transit draught of the units listed should have allowed them to pass through the Drogden with two exceptions namely RR12 and RR18. However, the latter unit should be able without modifications to pass under the future bridge over the East Channel of the Great Belt.

In fact, and perhaps this is what has been lacking up to now, with goodwill the Finnish producer of offshore units should in this way be able to solve the major part of its problem in a practical way.

Yesterday Dr. Koskenniemi stated that Denmark had neglected several factors in our Written Observations about the possibility for Finnish offshore units to pass through the Sound.

I believe that the observations he made on this subject are not valid in light of the remarks I have just made and the information contained in paragraph 5.2 of the report from "Det Norske Veritas" which explains the alternative sailing route through the Sound. However, I do not want to take up more of the Court's time with further technical explanations at this juncture but I reserve my right to revert to these matters at a later stage.

As for the few units which could not pass through the Drogden the necessary modifications to these units could be made in advance so that they could pass under the future bridge. As demonstrated the problem can be limited to a few semi-submersibles. In these units the top of the drill tower will have to be assembled after passage of the bridge. According to Danish experts subsequent assembly of the drilling tower will take under a week and cost less than US$1 million. This cost estimate is based on experience from similar operations carried out on Danish drilling units.

Such a procedure is not unknown in the offshore industry. There are yards in some countries located behind bridges which have to design and build offshore units that in a cost and time efficient way can be completed after the obstructions have been passed. Such yards are to be found both in the United States, in the United Kingdom and in Germany.

Finally, may I draw your attention to the front page of the sales folder of Rauma-Repola Offshore Oy produced as Annex 16 in our Written Observations. It gives a very good visual impression of a jack-up. As you can see, this is an enormous industrial construction being towed by some ships and it has no resemblance whatsoever with what one would normally call a ship.

Turning from these technological matters I would like to make a few concluding remarks on the financial aspects of the matter.

In our submission for a rejection of Finland's call for provisional measures we have among other considerations pointed to the lack of proportionality between the costs to the Danish nation of a suspension of the construction of the fixed link across the Great Belt and the damage which the building of this link is alleged to cause to the private company Rauma-Repola Offshore Oy.

The extensive costs to the Danish Society are spelt out in detail in Part I, Section G, in our Written Observations.

In paragraph 9 of its request Finland mentions that offshore constructions are an important part of the Finnish maritime industry. I am not denying that. But according to my information if you look at the export value of Finnish offshore production during the five-year period from 1986 to 1990 it was FIM 1,268 million. This represents 0.27 per cent of the total value of Finland's exports of goods during that five-year period, i.e., about one-fourth of 1 per cent of total Finnish exports.

This is as far as the importance of that export is concerned. In the same paragraph it is mentioned that the offshore oil exploration market will be needing from 200 to 400 new offshore exploration rigs and drill ships in the 1990s. This is not in accordance with the estimates of the future market for offshore equipment made available to us. Prospects for new constructions are not evaluated as very promising in the foreseeable future.

Fortunately we have some very good authority to base this estimation on.

I would like to read the following passage from the Annual Report of 1990 from the Company Rauma-Repola, page 33. It is not in the Written Observations provided by the Danish Government, it is the official Annual Report from the company itself. I would like to quote that passage:

> "The year-end orderbook stood at FIM 420 million which is FIM 200 million below last year's figure. Despite expectations to the contrary, the offshore market has remained difficult. The high level of costs in Finland will force Rauma-Repola Offshore to seek new ways to preseve its competitiveness on the market for oil exploration platforms.
>
> The company's operations showed a loss."

That is the end of the quotation from the Rauma-Repola Annual Report of 1990.

It seems to me that, against this information, the assumption in paragraph 9 that Rauma-Repola Offshore Oy expects to have a demand for 10 to 20 offshore units in the 1990s seems, to put it mildly, based on very flimsy evidence.

I find it hard to believe, as stated in paragraph 12 of Finland's request, that the sole means to ensure that Finnish, i.e., Rauma-Repola's, rights and interests are preserved, is the granting of provisional measures. Such measures would indeed cause great damage to the Danish society, but they would not alter the fact that Rauma-Repola Offshore Oy, according to the annual report I have just mentioned, is losing money because of high costs of production and bleak market prospects and, *not* because of the project for a fixed link across the Great Belt, such as has been alleged from the Finnish side. I thank you.

The Court rose at 12.55 p.m.

FOURTH PUBLIC SITTING (2 VII 91, 3 p.m.)

Present: [See sitting of 1 VII 91, 10 a.m.]

ARGUMENT OF MR. BOWETT

COUNSEL FOR THE GOVERNMENT OF DENMARK

Mr. BOWETT: Mr. President, Members of the Court, it is my task to examine the question whether Finland has satisfied the burden of proving that the interim measures it requests are necessary for the protection of the economic interests of the Finnish Company Rauma-Repola Offshore. Interim measures are a quite exceptional remedy, for they impose restraints upon a State's conduct before that conduct has been examined on the merits, and found to be unlawful. The Court's jurisprudence demonstrates the care — I might even say caution — with which the Court has examined requests for such measures. I believe it to be a fair assessment of that jurisprudence to say that the Court has always insisted on strict proof of two elements: first, that there is such urgency as to require interim measures, and, second, that without such measures irreparable harm will be caused to the Applicant. Let me deal with these two elements separately.

1. PROOF OF "URGENCY"

One can see the Court's insistence on this element by comparing its handling of two cases: the *Trial of Pakistani Prisoners of War* case and the *Nuclear Tests* case. In the latter, at the stage when interim measures were granted, further nuclear tests were believed to be imminent. In the former case, the very fact that the Parties sought some delay to allow for negotiations belied any real urgency, and so the request was denied.

In the present case, in considering whether Finland has established that there is real urgency, there are a number of factors which, in my submission, the Court will wish to bear in mind.

First, there is Finland's own apathy. As the Agent for Denmark has explained, Finland was notified of the possibility of a bridge being built in May 1977. If it takes 13 years to react, does this suggest "urgency"? Of course, as we heard yesterday, Finland seeks to avoid the accusation of apathy by suggesting that the *decision* to build a bridge, rather than a tunnel, was reached only in October 1989. But this explanation will scarcely do. Because it was clear much earlier that a bridge was the more likely option, and other States, like the Soviet Union, very sensibly reacted. They did not wait for the final decision for the very good reason that they knew that the reactions of the Baltic States were needed *before* the final decision was made. Obviously, opposition or lack of opposition was crucial to that decision. What was the use of waiting until *after* the final decision had been made?

Second, the notion of "urgency" is linked to that of inevitability, for the measures are necessary now precisely because, otherwise, the damage is inevitable. But do we really have inevitability in this case? As Ambassador Fergo has explained, the drill-ships can all pass through the Sound, and so can the jack-up platforms. At least that is if they are towed. It is not *inevitable* that they be transported on heavy lift ships with a draught that exceeds the depth of the Sound.

Third, the suggestion that there is an urgent need for provisional measures to remove the uncertainties in the present situation makes little sense. Whatever uncertainties exist, no order for provisional measures will remove them. Only the Court's final judgment on the merits will do that.

Fourth, in any event, no one envisages the construction of the bridge proceeding very quickly. The estimate is that the Great Belt will not be obstructed by the new bridge until late 1994 at the earliest. And by then the Court will have dealt with the merits. So, what is the urgency ? Of course, one can anticipate Finland's response to that question. Finland will doubtless say that unless the project is stopped *now*, it will never be stopped. In fact Dr. Koskenniemi said precisely that yesterday. When he spoke of the work soon reaching a "point of no return" — those were his words — "a point of no return" — he was simply expressing the view that the work may soon reach the stage at which Denmark simply could not modify the design for the East Bridge, or replace it by a tunnel.

But that can only mean that Finland is applying for interim measures on the basis that it believes that Denmark will not comply with a judgment on the merits against Denmark. Finland has no basis for such a belief, and the belief is not one which this Court can adopt. It is simply not possible for this Court to grant an application for interim measures on the basis that the Court does not believe the Respondent State will comply with the Court's judgment on the merits.

So, in my submission, Finland has failed to show that there is any real urgency. I turn, now, to the second element, the need for proof of irreparable damage, unless an order is made.

2. Article 41 of the Statute : The Need for Proof of Irreparable Damage

Necessarily, we must start from the Court's Statute. The Court's discretionary power to order interim measures is conditional on a finding that such measures are necessary : the actual words used in Article 41 are "if it considers that circumstances so require . . .".

But if the circumstances must *require* such measures, this can only mean that such measures have been proved to the satisfaction of the Court to be necessary. Had the Statute used such words as "that circumstances indicate to be desirable" or "that circumstances suggest to be opportune", we might have had a much less-demanding test. But if the measures have to be "required", the test is, in effect, one of necessity.

When one looks to the practice of the Court one can see how the Court has conformed faithfully to the Statute and applied the test rigorously. Some of the cases are abundantly clear.

For example, in the *Nuclear Tests* case the Order of 22 June 1973, paragraph 27, recited the Australian view that damage caused by radio-active fall-out would be irreparable and "irremediable by any payment of damages". So, too, in the Court's Order of 15 December 1979 in the *Tehran Hostages* case, where the Court noted that the United Nations Secretary-General had regarded the situation as posing "a serious threat to international peace and security" and stated its own conclusion that there was "even danger to life and health and thus to a serious possibility of irreparable harm" (para. 42).

The Court's Order of 10 May 1984 in the case concerning *Military and Paramility Activities in and against Nicaragua* was based on similar considerations. Nicaragua alleged that 1,400 deaths and 1,700 serious injuries had already occurred. The Court, in paragraph 32 of its Order, while not subscribing to these numbers, did refer expressly to "the rights of Nicaraguan citizens to life, liberty and security". It seems clear that the Court viewed violations of these rights as not adequately compensated by any award of damages.

In the *Burkina Faso/Republic of Mali* case, the Order of 10 January 1986 noted that persons and property were exposed to a "serious risk of irreparable damage" (para. 21).

Conversely, in the *Aegean Sea* case, in its Order of 11 September 1976, the Court declined to make any order because any breach by Turkey of the rights of Greece "might be capable of reparation by appropriate means" (para. 33). It seems certain that the Court had financial compensation in mind.

It might be thought that the *Fisheries Jurisdiction* case represented something of an exception, for the Court's Order of 17 August 1972 indicated certain interim measures when the interests likely to be damaged — I refer to the loss of fishing rights — were economic and could be compensated by damages. But in fact in that case the United Kingdom had explained to the Court that, with the loss of a whole season's catch, many fishermen would be bankrupt, their ships forfeited, and their livelihood ruined. So the damage was truly irreparable.

In fact, the only case that does not quite fit into this consistent pattern is the early Order in 1951 in the *Anglo-Iranian Oil Co.* case (*I.C.J. Reports 1951*, p. 103) and perhaps that is best explained by Iran's failure to appear and contest the application by the United Kingdom.

But, that one case apart, we have a consistent case-law, a *jurisprudence constante*. And it is to the effect that anticipated damages which can be adequately compensated by an award of financial damages, monetary compensation, are not to be deemed "irreparable" and do not meet the test of necessity required by Article 41.

This very rigorous test, which the Court has adopted, is clearly right. For, in effect and certainly in this case, an order by the Court for provisional measures would be an order that Denmark should cease to perform acts within its own territory which are prima facie lawful. At this stage Finland has not proved, and is not required to prove, that the acts are unlawful. Therefore, as things stand, and until Finland proves the contrary, any order by this Court would require Denmark to cease conduct which must be deemed to be lawful. It should cause little surprise to find that before taking such a step the Court has to satisfy itself that it is absolutely necessary to make such an order.

3. The Requirement of Proportionality

I turn now to the requirement of proportionality because there is a further element in the Court's jurisprudence which is of the utmost importance in the present case. This is the element of "proportionality".

I mean by that that the Court does not simply look at the interests of the applicant State to see whether, by reference to that State's interests, an order is necessary. The Court looks to the interests of both Parties, and attempts to strike a balance between them. Because a measure which may appear reasonable, and even necessary, when looked at solely from the Applicant's point of view, may appear unreasonable or disproportionate when the interests of the respondent State are brought into the picture.

The Court's endeavour to strike a balance, to make any order reasonable and proportionate in the light of the interests of both Parties, can be seen in the *Fisheries Jurisdiction* cases.

The Order of 17 August 1972, although sought by the United Kingdom as Applicant, expressly stated the following:

> "it is also necessary to bear in mind the exceptional dependence of the Icelandic nation upon coastal fisheries for its livelihood and economic development . . ." (para. 23).

Thus, to safeguard the interests of the respondent State, Iceland, the Court imposed quota restrictions on fishing by the applicant State, the United Kingdom.

My suggestion is that, in the case before you, the Court has a classic example of a situation in which the principle of "balance", of "proportionality", requires that the Court must look also to the interests of the respondent State, Denmark.

And, as we shall see, whatever the speculative losses that might be incurred by Rauma-Repola Offshore, the certain and enormous economic loss to Denmark is beyond question. That, in itself, argues against the granting of any order. But let us examine this comparison more closely.

(a) *The Anticipated Losses of Rauma-Repola Offshore*

Paragraph 23 of Finland's Application tells us that two jack-up rigs are presently under construction, in a joint venture with a corporation from the Soviet Union. Their value is said to be around US$100 million each.

As regards these two rigs, we are given very little further specific information. But, obviously, there are questions which have to be asked.

First, when will they be ready? Presumably within the next 3 years, in which case they will pass through the Great Belt before the bridge is built. In that case they really have no relevance in justifying an order of provisional measures to halt the construction of the bridge.

Second, do we know that they cannot pass through the Sound? We do not. We are told only that jack-up rigs are transported by heavy-load transport vessels with a draught of "up to 10 metres or more". Do we know that they cannot be towed through the Sound by shallow-draught vessels? We do not. Do we know why Finland refuses to contemplate the alternative of towing? We do not.

Third, do we know the cost of adaptation of the design of these rigs, so that they can be transported in sections of a height less than 65 metres and reassembled later? We do not. Or do we know what part of that cost would fall on the Finnish company, as opposed to the Soviet company? We do not. As regards other tall structures, likely to exceed 65 metres in height, Finland's Application refers only to a possible demand for between 10 and 20 drill ships and rigs during the decade of the 1990s.

So, we are to anticipate around 1.5 such ships, or rigs, each year. But this, apparently, is speculation. There are, apparently, no firm orders and built into this speculation are a whole number of hypotheses or questions. Will Rauma-Repola get these orders in the next decade, against competition from shipbuilding yards in Germany, Holland, Norway, the United Kingdom, Japan and so on? Will the oil market over the next decade justify the assumption that, overall, some 200 to 400 new exploration rigs or drill vessels will be needed? For the anticipated share of Rauma-Repola is based on that assumption. Will Rauma-Repola continue manufacturing these rigs, even at a loss? As Ambassador Fergo has explained, the Company's 1990 Annual Report indicated that the Company was operating at a loss. Can we assume it will, nevertheless, continue to produce these rigs over the next decade, even at a loss?

Will the rigs or ships needed be of this type, i.e., these very tall structures? Will the structural engineers who design these rigs not be able to adapt their construction techniques to overcome this problem of height? Will demand still be in the North Sea, or will it shift to the Far East, for example, thus favouring Japanese or Korean shipyards?

The Court will see that we are in an area where the damages, far from being certain, are highly speculative. In most legal systems, future, speculative and uncertain damages of this kind are not recoverable on the merits. How, therefore, can such damages justify an application for provisional measures, even before we reach the merits?

But it is not simply that the damages are speculative. They are also, clearly, financial. They are exactly the type of damages which, once proved to the satisfaction of the Court, are met by monetary compensation. If that is so, they are not "irreparable" in the sense required for an order of provisional measures.

Lastly, the damages anticipated by Rauma-Repola are not only speculative but relatively modest. In Denmark's Written Observations, paragraph 55, we have given the cost estimate of Denmark's own experts of the likely increase in cost of reassembly for those few drilling units that cannot pass through the Sound: less than US$ 1 million per unit. So, even on the most optimistic view of Rauma-Repola's share of the market, we have an additional cost of, say, US$ 15 million over the next decade.

And, of that, no doubt, a share will be borne by the Soviet partner in the joint-venture. So, perhaps, realistically we are talking of no more than US$ 10 million as speculative damages, over a decade.

Now, I want to turn to the other side of this "balance", to see whether the losses likely to be suffered by Denmark, if this order is made, are in any sense proportionate.

(b) *The Anticipated Losses to Denmark*

There is no need for me to repeat the estimates of losses on the Danish side. In paragraphs 68 to 81 of Denmark's Written Observations, we have itemized the losses likely to be suffered by the Danish construction company if work is suspended for three years — some US$453 million. That, in itself, is about 30 times the losses likely to be suffered by Rauma-Repola. And these losses by the Danish company are virtually certain: they are not speculative, like the Finnish losses.

But, massive as the Danish company's losses will be, there are even greater losses likely to be incurred by the State of Denmark and by Danish society in general. When you think of the loss in employment; when you think of the postponement of new investment; when you think of the loss of time in travel and communications; when you think of the cost of maintaining large stocks in many industries because of the continuing dependence on ferry transport, you are thinking in almost incalculable sums. The loss will be almost certainly astronomical. It will dwarf Rauma-Repola's speculative losses into insignificance.

So, where is the proportion, the balance? There is none. For the sake of a relatively minor, speculative profit by one Finnish company, the entire nation of Denmark is being asked to bear incalculable losses.

4. The Discretionary Nature of the Remedy

It is clear that no party has a right to demand an order for provisional measures: the making of any such order is entirely within the discretion of the Court.

I have already identified certain factors which, according to the Court's own jurisprudence, should guide the exercise of that discretion: the necessity for the order, the irreparability of the apprehended damage, and the element of proportionality between the losses apprehended by both Parties.

But there is another element which, I would respectfully submit, the Court should take into account.

In essence, we are faced here with two Parties, each fearing damage according to whether the order is, or is not, made. But the two Parties are — when one looks to the damage — on the one hand a private, capitalist company, and on the other a State engaged in the most ambitious programme of economic development it has ever attempted. If you weigh, on the one hand, the interest of Rauma-Repola, and, on the other hand, the interests of Denmark, they can scarcely be discussed on the same plane. As the Agent of Denmark has explained, Denmark cannot — like Rauma-Repola — diversify into some other type of construction. Denmark needs this bridge, as an economic development project essential to the social and economic well-being of its people.

So the Court is not balancing two similar "rights" against each other. It is balancing a private, economic right — a right to make profits — against a nation's right to promote the well-being of its people.

Let us suppose that Rauma-Repola operated inside Denmark, as a foreign company, and because its shipyard was located on a site needed for construction of the new bridge, Denmark proposed to expropriate. Would the Court contemplate an order for provisional measures to restrict the right of Denmark to expropriate? Certainly it may have done so, way back in 1951 in the *Anglo-Iranian Oil Co.* case. But would it do so now, given the new and universal acceptance of the right of States to sovereignty over their natural and national resources, and their right to economic development?

I submit, Mr. President, that the Court would wish to exercise great caution before using its powers under Article 41 to control or check the exercise by a State of its right to promote its own economic development, within its own territory. The precedent established thereby might be of very serious concern to many States with plans for economic development.

Of course, one can anticipate Finland's reply, which may say that here the situation is different, because Rauma-Repola claims the benefit of a right of passage, guaranteed by international law. But, there are difficulties about that basis for a distinction. First, the so-called "right" is very much a subject of controversy, to be decided later on the merits. And, second, in many, typical expropriation situations, the foreign investor can invoke a similar "right". A right of establishment, for example, under a bilateral investment protection treaty would be an obvious example.

Now, I am not, of course, attempting to argue that international law cannot impose any legal restraints upon States in dealing with foreign investors. My purpose is rather to suggest that the remedy of an order for provisional measures is not an appropriate remedy. If there is a violation of rights, the remedy ought to lie in compensation or damages.

Now, if that is right, the question arises: why should Rauma-Repola be in a stronger position, to claim that remedy, via Finland, merely because it operates, not in Denmark, but abroad in Finland?

I suggest there is in fact no reason to place Rauma-Repola in a stronger position. On the contrary, all the elements that go to the exercise of the Court's discretion are against it. The lack of any real necessity, the absence of proof of any irreparable damage, the speculative nature of such damage, the vastly greater injury to Denmark, and the inappropriateness of an order for provisional measures to prevent a State carrying out important measures of national, economic development — these are all elements in the present case that argue for a dismissal of Finland's application.

5. THE NATURE OF THE REMEDY SOUGHT BY FINLAND

Mr. President, I have to say that I am uncertain what, precisely, Finland is asking for.

Both the Agent for Finland and Sir Ian Sinclair emphasized that they were not seeking a blanket, comprehensive order for the cessation of all construction. It was, Sir Ian explained, a request for *minimum* measures.

But then, in the same breath, Sir Ian itemized the three factors which make it necessary that construction should stop *now*. He explained why it was no consolation to Finland to be told that passage through the Great Belt would be unaffected by the bridge construction, until maybe 1996 or 1997 — long after the Court's judgment on the merits. The Court will recall how he stressed the unity, the interrelated character of the whole project; how he explained that Rauma-Repola was already losing orders; how he explained that obstruction of navigation would be inevitable even during construction.

I was left with the very clear impression that there is nothing "limited" about the remedy Finland seeks. It is, in effect a total stoppage of all further construction work. Of the devastating effect that would have on Denmark's economy we heard not a word.

From this it is obvious that the element of "balance", of "proportionality", which is clearly present in the case-law — although ignored by Sir Ian — is not present at all in the minds of Finland. They are so categorical on their legal rights, so obsessed with the profitability of Rauma-Repola, that they have not given a thought to the interests of Denmark. "Balance" apparently, does not enter into it.

The idea that Rauma-Repola might modify its construction techniques, before passing out of the Baltic; or might consider towing rather than carrying by heavy-lift ships through the Sound, is not to be entertained. Why? Because that would involve some costs to Rauma-Repola. So, all the modifications must be made by Denmark, no matter what the cost.

The Court will no doubt bear these factors in mind when exercising its discretion. Certainly, Sir Ian is right when he says discretion is not arbitrariness.

Yet, in fact Finland seeks just such an exercise of arbitrariness. For it seeks a remedy based solely on the interests of Finland, and ignoring totally the interests of Denmark.

There is one final point I should make about the remedy claimed by Finland. It must be apparent that, even at this preliminary stage, the arguments by Finland are designed to pre-judge, to pre-determine, the remedy Finland seeks on the merits. The emphasis on restitution, the insistence on full preservation of Finland's existing rights, the attack on "absolute" irreparability, the doubts cast on the Order of the Court in the *Aegean Sea Continental Shelf* case: can there be any doubt where all this is leading to?

Clearly, it is leading to the proposition that, when we come to the merits, damages can never be an appropriate remedy. The aim is "restitution" — the complete preservation of Rauma-Repola's existing practices, without modification — and there is to be no question of an award of compensation for any additional costs Rauma-Repola might incur by having to modify its construction methods or having to tow submersibles through the Sound, or remove azimuth motors during passage through the Sound.

All of these modifications are possible — but Rauma-Repola will have nothing to do with them. Denmark must modify its plans, but not Rauma-Repola.

The argument on "urgency" goes in exactly the same direction. Why are interim measures urgent? Not because there is any imminent risk of passage being blocked: there is no such risk within the next three to four years. No, the real reason why it is urgent is that Finland believes that, unless the construction is stopped *now*, Finland will have no hope of an order of restitution on the merits. Finland will have to be satisfied, if it succeeds on the merits, with compensation.

So, the whole strategy is designed to avoid the remedy of compensation. If Finland is to win on the merits it seeks only one remedy — restitution. These proceedings for provisional measures are simply a means to an end. They are designed to ensure that, if Finland succeeds on the merits, it will have one — and only one — remedy — restitution.

Now, the Court will need to consider very carefully whether this is a legitimate purpose for provisional measures. And whether it wishes to have its normal discretion in choosing an appropriate remedy curtailed by a Party in this way.

Mr. President, that brings me to the end of my presentation. I thank the Court for its courtesy and patience and I would ask you to call on my colleague Per Magid.

ARGUMENT OF MR. MAGID

AGENT FOR THE GOVERNMENT OF DENMARK

Mr. MAGID :

GENERAL PRINCIPLES OF LAW ON LIABILITY FOR DAMAGES CAUSED BY PROVISIONAL MEASURES

Mr. President, Members of the Court, my task is to examine the question whether international law provides that Finland, if successful in obtaining provisional measures, would be liable towards Denmark for the losses caused by these provisional measures in the event the Court rejects Finland's submissions on the merits.

Finland requests the Court to indicate provisional measures which would cause Denmark to refrain from continuing or otherwise proceeding with such construction work on the East Bridge as would impede the passage of ships, including drill ships and oil rigs. This is the way Finland's written request has been worded. Finland's request for provisional measures amounts to a request for an injunction.

The position of the Government of Denmark has been made clear by my colleagues who have pleaded on behalf of Denmark. For the reasons given by them Finland's request for provisional measures should not be granted.

Should the Court, nevertheless, decide in favour of Finland, and cause Denmark to suspend the works on the East Bridge, such decision will be of grave consequence to Denmark and to the Danish economy. I have already described to the Court the enormity of the losses Denmark will incur.

But there remains an important question : if Finland prevails on its request for provisional measures, should the Court then also indicate that Finland must undertake to compensate Denmark for all losses incurred in complying with such provisional measures in the event Finland fails in its case on the merits?

In answering this question we must look to the Statute of the Court. According to Article 38, Section 1 *(c)*, of the Statute the general principles of law recognized by civilized nations shall be applied by the Court.

I submit, Mr. President, that it is a general principle of law recognized by civilized nations that a party requesting an injunction is liable for damages suffered by the other party as a consequence of such injunction, if the Court later decides that the acts which were subject to the injunction were legal.

My suggestion is that this principle should be applied by the Court.

When Denmark received the request for provisional measures we undertook to find out whether this principle, which is well-founded in Danish law, is applied also in other jurisdictions.

I trust that the Court will appreciate that the short time available for the preparation of this oral hearing did not allow for making a comprehensive research. We have had to limit ourselves to obtaining opinions from lawyers in those countries where we had the easiest access to the information needed. The result of this research shows the following : all the legal systems from which opinions have been obtained recognize the principle of liability of the party requesting and obtaining an injunction for damages caused by such measures to the other party in the event the requesting party fails in the main case.

Mr. President, in the following I will refer to statutes and court decisions from various countries. To facilitate the work of the Court we have furnished the Court with copies of the statutes and the decisions to which I refer.

Scandinavia Law

Since this is a dispute between two Scandinavian countries, a relevant starting-point would be to ascertain what rules apply in the Scandinavian countries. The Court may know that the legal systems of the Scandinavian countries have many similarities. The common historical heritage of the Scandinavian countries and a strong movement among outstanding Scandinavian legal scholars at the end of last century to promote joint legal initiatives are the main reasons for these similarities.

(a) *Finland*

In Finland the Execution Act, Act No. 37 of 3 December 1895 with later amendments, provides in Chapter 7, Section 16, in pertinent part:

> "A sequestration or an interdiction against sale or dispersion may not be carried out . . . if the applicant has not given security or granted a guarantee to . . . the execution officer for the damages which the action may cause the opponent . . ."

Section 20 of the Act, as amended by Act No. 389 of 18 May 1973, provides:

> "A claimant who needlessly has asked for sequestration or injunction or other executive assistance shall compensate the debtor for the damages caused by the execution and for the costs in the matter."

(b) *Sweden*

Chapter 15, Section 3, of the Swedish Code of Civil Procedure, rules for issuance of injunctions subject to certain conditions.

Chapter 15, Section 6, of the Code, provides in pertinent part:

> "A measure authorized in Section . . . 3 may be granted only if the claimant deposits with the court security to recompense the adverse party for the loss he may suffer."

(c) *Norway*

Norwegian law contains similar provisions in the Enforcement Act, Act No. 7 of 13 August 1915.

Article 261 of the Act provides that if the party requesting a seizure of property and who does not succeed in obtaining an enforceable decision for the claim is liable to compensate the other party for all losses which the other party may have suffered due to the seizure. According to Article 268 of the Act the same rule applies to other interim measures including injunctions.

(d) *Denmark*

In Denmark the rules on injunctions are found in the Code on Civil Procedure (Act 731, 7 December 1988) as, in Norwegian law, the Act distinguishes between seizure and injunction. Article 639, Section 1, of the Act provides that a person who has obtained a seizure on the basis of a claim which turns out not to exist is liable for damages to the party subjected to the seizure. According to Article 648, Section 1, of the Act, the same rule applies in case of unjustified injunctions.

The legal status in all Scandinavian countries is that a party requesting and obtaining an injunction is liable for damages caused by the injunction, if he fails in his main case. This is a strict liability. A liability which is incurred regardless of any fault, or whether there be good or bad faith on the part of the requesting party.

Mr. President, I submit that it seems just and fair that the Government of Finland should expect and accept that principles identical to its own legal system and the legal systems of the other Scandinavian countries should be applied in the present case.

OTHER EUROPEAN COUNTRIES

On the European continent, other countries have rules similar to the Scandinavian legal system.

(a) *Germany*

In Germany, the Code of Civil Procedure contains provisions on seizure in Articles 913 to 934 and on preliminary injunctions in Articles 935 to 945.

In the event a preliminary injunction is subsequently proven unjustified, Article 945 of the Code on Civil Procedure expressly provides that the applicant is liable for damages. The Article provides in pertinent part:

> "If the order . . . of a preliminary injunction proves to have been unjustified from its inception . . . the party who secured the order is liable to compensate the opponent for the damage arising from the execution of the ordered measure."

Like the Scandinavian system, liability for damages based on Article 945 of the German Code on Civil Procedure arises independently of any fault of the applicant. Direct and indirect damages which are actually caused by the execution of the preliminary injunction, including possible loss of profits, must be compensated.

(b) *Italy*

The Italian Code on Civil Procedure contains provisions for instituting provisional measures against what is called, I understand, "new construction". Article 1171 of the Italian Code on Civil Procedure provides in pertinent part:

> "The owner, the holder of other real right of enjoyment, or the possessor, who has reason to fear that new work undertaken by others on their own or someone else's land can cause damage to the thing that forms the object of his right or his possession, can denounce the new work to court."

And it follows:

> "The court, taking summary cognizance of the facts, can forbid continuation of the work . . . ordering the appropriate security . . . for payment of

> the damage produced by suspension of the work, when the opposition to its continuation turns out to be unfounded in the decision on the merits."

Article 700 of the Italian Code of Civil Procedure contains provisions for urgent relief.

Article 96 of the Code deals with the liability for having petitioned an ungrounded provisional relief. The relevant part of the provision states:

> "The judge who ascertains that the right for which an urgent relief order has been executed does not exist . . . , upon petition of the damaged party, shall sentence to indemnification of the damage the petitioner who has acted without normal diligence."

In ordinary proceedings in Italy, damages can only be ordered if the petitioner has acted in bad faith or grossly negligent.

(c) *France*

The French Code of Civil Procedure contains in Articles 808 to 809 and 872 to 873, the rules for obtaining a preliminary injunction.

French courts also award damages to a party that has suffered prejudice as a result of an injunction, if the main claim lodged by the plaintiff is subsequently dismissed. I refer to the Decision of the Cour de cassation dated 12 May 1971 as an example of this. In this case, the defendant was the owner of an estate. He had obtained a building licence through a municipal decree. A dissatisfied neighbour obtained a preliminary injunction from the civil judge ordering the holder of the building licence to stop the construction works. An administrative court later dismissed the claim of the neighbour seeking the nullity of the municipal decree. In its Decision of 12 May 1971 the Cour de cassation upheld the decision of the lower court, which had awarded compensation to the holder of the building licence for damages caused by the injunction.

The consistency in this field of law between, on the one hand, French law and, on the other hand, Scandinavian law and German law is further supported by the Decision rendered on 4 January 1983 by the Court of Appeal of Versailles, concerning attachment of the assets of a debtor. In this Decision, it was held that an unlawfully attached debtor may sue the claimant for damages in order to receive compensation for the prejudice suffered due to the attachment.

(d) *England*

The general principle applied in England regarding damages for unjustified injunctions is that a court of equity will invariably make use of its power to require undertakings by the plaintiff. A common form is to request the plaintiff to:

> "abide by any order which this court may make as to damages, in case this court shall be of opinion that the defendant shall have sustained any, by reason of this order, which the plaintiff ought to pay".

An important English precedent is Giffith v. Blake (1884) 27 Ch. D. 474. In this case, the plaintiff, a firm of solicitors, were the tenants of a newly erected building. A few months after they had taken possession, the defendants, who were ironmongers and tinplate workers, occupied an adjoining house. The noise created by the defendants' occupation caused the plaintiff to request an interlocutory injunction to stop the defendants' work. In his dictum, Lord Justice Lindley stated: "if the Plaintiffs ultimately fail, the Defendants can obtain, under the undertaking, full compensation for the injury done to them by the injunction".

An English court cannot compel a plaintiff to make an undertaking, but can refuse an injunction unless he does so.

In England, as in most other jurisdictions examined, a plaintiff obtaining an injunction, but failing in the main case, is liable to pay damages for losses caused by the injunction, regardless of good or bad faith.

THE UNITED STATES OF AMERICA

Finally, I will turn to the United States of America as the law is applied by the United States Federal Courts. Rule 65 (c) of the Federal Rules of Civil Procedure provides in pertinent part:

> "No . . . preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for payment of such cost and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained."

Rule 65 (c) thus make the posting of a preliminary injunction bond mandatory.

One Federal Appeals Court has explained the purpose behind the requirement to post bond as follows:

> "[I]t serves two functions (1) it assures the enjoined party that it may readily collect damages from the funds posted . . . and (2) it provides the plaintiff with notice of the maximum extent of its potential liability . . ." (*Continuum Co., Inc. v. Independent, Inc.*, 873 F. 2d 801, 802 (5th Cir. 1989).)

According to United States case-law it is an integral element of the bonding obligations that damages are payable to the enjoined party if it eventually defeats the main claim. The leading United States federal case of *Coyne-Delaney v. Capital-Development Board* (717 F. 2d 385 (7th Cir. 1983)) makes clear that an applicant's good faith in seeking the preliminary injunction does not relieve it from this liability. Only in unusual circumstances, such as where the opponent of the applicant fails to mitigate its damages, will the applicant be excused from paying the damages brought about by the improvidently granted preliminary injunction. The same principle is applied in *State of Alabama et al. v. United States Environmental Protection Agency* (925 F. 2d 385 (11th Cir. 1991)).

CONCLUSION

I now come to my concluding remarks. I submit, Mr. President, that provisional measures are a powerful, effective but potentially harmful remedy. If obtained, and respected, damage may be caused by such measures, damage which might later be proven unjustified.

In national law, a plaintiff requesting and obtaining such measures knows that he is at risk if he fails in the main case. This induces restraint on behalf of the plaintiff and at the same time it affords the defendant some comfort. The liability established in connection with injunctions under national law also serves to create a framework for negotiations between the parties and may enhance the likelihood of friendly settlement.

I suggest that this should be taken into consideration by the Court in the event the Court decides to indicate provisional measures.

Far-reaching decisions on provisional measures under circumstances where the parties have not yet set forth their case in full, the Court has not had the opportunity to establish the relevant facts and the Court has not ruled on the legal issues pertaining to the main case.

The survey of national law supports the contention that liability for damages caused by an unjustified injunction is a well-established general principle of law in the meaning of Article 38 of the State of the Court.

I submit, therefore, that if the Court does indicate provisional measures it should also impose on Finland an obligation to compensate Denmark for the losses caused by provisional measures in the event the Court rejects Finland's submissions on the merits. For otherwise, Denmark will be left to bear an enormous financial burden even though, ultimately, the Court finds Denmark to be acting lawfully.

Mr President, this concludes the first part of Denmark's oral presentation. Thank you, Mr President, for your courtesy and patience.

The Court rose at 4.20 p.m.

FIFTH PUBLIC SITTING (4 VII 91, 10 a.m.)

Present: [See sitting of 1 VII 91, 10 a.m.]

The PRESIDENT: This morning we turn to the second round of the oral pleadings and hear throughout this morning the case for the Republic of Finland. I think both Agents know that two Judges will wish to ask questions of one of the Parties and we would propose to do that at the end of this morning's session. The question of replies we can perhaps discuss later. So straight away I will ask the Agent for Finland, Ambassador Gronberg to take the floor.

STATEMENT BY MR. GRONBERG

AGENT FOR THE GOVERNMENT OF FINLAND

Mr. GRONBERG: Mr. President, Members of the Court, last Tuesday we heard a very remarkable reconstruction of the Finnish claim and both its legal and factual background. In litigation one of the first and often the most important battles is fought about the terrain on which the rest of the war — if you allow me to use a military metaphor — will be waged. You will no doubt have noticed that the terrain looked very different from the ground on which Finland had stood the day before.

This change of terrain seemed to affect even the very perception of the purpose of the present oral hearings. Where Finland concentrated on proving the presence of the conditions for provisional measures under Article 41 of the Statute, Denmark chose to argue about Finland having no rights on the merits. Where Finland spoke about the substance of the right of free passage, Denmark advanced economic and technical data. Where Finland saw the dispute in light of the general conflict of interests between a strait State and a user State, Denmark painted a picture about a private company's economic interests being countered by the economic interests of the Danish society as a whole. Where Finland formulated a request for provisional measures in the most reasonable and limited terms, Denmark argues that the consequences of its acceptance are as if it were formulated in the widest imaginable terms.

What might be the reason for Denmark's unwillingness to meet Finland on the precise grounds of the Finnish request and indeed of the Application? I can hardly believe there to be any other reason than Denmark's belief that its argument will not stand if it tries to rebut Finland's actual contentions in the light of the actual rights that Finland claims. Instead, it has attacked a straw man, an imaginary construction of what the Finnish request might have been — but most decidedly is not.

In my statement today, I shall first contest Denmark's view of what it is that Finland aims to attain and its characterization of the dispute as a conflict between the private economic interests of a company and the Danish society at large. This I will do in order to move discussion back to the substantive right of free passage which is the object of the main proceedings and the need for an indication of interim measures to safeguard that right.

Thereafter, I shall say a few words about how Denmark's view that Finland has not even a prima facie right in this case — a remarkable contention — is based on its distorted characterization of the core of these proceedings.

Thirdly, I shall turn to the question of the alleged acquiescence by Finland in the Danish project.

First, the question of the actual content of the Finnish request. Ambassador Lehmann claimed on Tuesday that Finland "submits that provisional measures be indicated to stop further construction of the bridge over the Great Belt". This same view about the scope of the Finnish request was then repeated throughout the Danish statements. This is not only an incorrect reading of the very terms of the Finnish request but is contradicted by everything that we had said here on Monday. What Finland is requesting is *not* the complete cessation of the fixed link project. That would indeed be an unreasonable request — though, one might argue, that would be a request which would perhaps be easier to defend. What Finland is requesting is instead something both limited and reasonable — a general declaration by the Court that the project should not be carried out, pending the judgment, in such a fashion as to prejudice the rights claimed in the main proceedings.

What should be noted about that remedy is that it incorporates the very notions of reasonableness and proportionality which provide the grounds on which Denmark hopes to challenge it. Such a remedy in fact constitutes a balance between the rights of Finland and Denmark. On the one hand, it will minimize harm to Finland's rights while the merits are being considered. On the other hand, it enables Denmark to choose between the different alternatives for safeguarding the Finnish rights the one which is least prejudicial to its own interests. The request specifically avoids the imposition on Denmark of any one solution — and thus also the risk of arbitrarily and unreasonably preferring one among the several existing technical alternatives to satisfy Finland's rights regardless of the costs Denmark would incur. Denmark's attempt to argue that Finland in fact seeks a blanket prohibition is baseless and, as I shall argue in a moment, thrown against Finland only to establish a more favourable ground for Denmark from which to argue that the Finnish request is unreasonable.

Finland is not trying to impose any technical solution on Denmark — among them the solution of full cessation of works. We believe that the reasonable solution is the one which leaves Denmark maximum freedom of choice. I might, however, note one available alternative which would seem to answer fully to the present request and the costs of which would not be exorbitant.

This is the possibility to modify the design of the East Bridge so as to postpone the final construction of the two intermediate supports plus the corresponding three spans. This would allow work to continue on the suspension bridge itself as well as with the access spans at the other end of the bridge. By this means — on a stretch of 330 metres — provision would have been made for a possibility to construct an opening — for example in the form of a swing bridge — in that section of the bridge in case the final judgment turns in Finland's favour. This would have virtually no effect on the construction schedule and would minimize any additional work necessary to safeguard free passage. That additional work would mainly have to do with dredging the deep water channel into the place where the opening exists, that is to say, that would mean the execution of the same type of work as was already done when constructing the artificial island of Sprogø.

According to a very preliminary Finnish cost estimate, the construction in such a place of a bridge — not taking into account the necessary dredging — would cost perhaps US$50 million more than the fixed bridge. That is the additional cost that would ensue from the de- and reassembly of the towers of three to four offshore rigs. A cable-stayed swing bridge, according to another estimation, might also be an elegant alternative with reasonable cost.

Other possibly available alternatives would be:

(1) To make provision for the opening of the West Bridge — which is possible using conventional techniques — and for the dredging of the West Channel.

The main problem here would relate to the safety precautions needed in the event of opening a railway bridge.

(2) A second alternative would simply consist of the dredging in the Sound at Drogden, so that it could accommodate deep-draught vessels. I understand that such a venture has already been proposed by the city and harbour of Copenhagen and that it would have a significant, positive impact on the harbour itself.

Now, I am certain that my Danish colleagues know these and other alternatives and are aware of the advantages they have and of the difficulties their realization might entail. After all, they have been studying them for half a century. But my point really is that technical alternatives do exist and that Finland has refrained from trying to impose any of them on Denmark, because of the relative arbitrariness and unreasonableness of doing so. Finland was accordingly astonished by the Danish presentation of the exhorbitant consequences that the Finnish request might entail.

Let me at this point note a persistent inconsistency in the Danish case. Though Denmark has based its arguments on the enormous social costs that granting the request would entail to Danish society, it has, simultaneously, claimed that there is no urgency in the matter because, as Professor Bowett noted "the estimate is that the Great Belt will not be obstructed by the new bridge until late 1994, at the earliest" (CR 91/12, p. 10).

If the former argument is correct, i.e., if the only way to safeguard Finnish rights is to cease the works completely, then we do not really understand how Denmark could claim that there is no urgency and that it can anyway continue the work until 1994. If the latter argument is correct — that there is no harm until 1994 — then we must remain puzzled about the claimed need for a complete cessation of works and the enormous social costs this would entail. Surely Denmark must choose between these two tacks: are the works immediately harmful? In which case, complete cessation is not only needed but seems to follow from the requirements of urgency and irreparability. Or, is no such immediate harm entailed? In which case, the whole argument about enormous social costs loses its foundation.

So, let me repeat that the interpretation of the Finnish request as if it were a request for a blanket cessation of all works is an incorrect reading of the terms of the very request. Nor can it be argued, on the Danish side, that it anyway can be complied with only by a complete cessation of works, for, on their own words, the project will not create an obstacle before 1994. An order to that effect might provide the relief Finland is seeking, though, I submit, this would be an order whose consequences would indeed seem extensive if Denmark took no precaution for the possibility of a final judgment in Finland's favour.

Now, I believe that Denmark knows all too well that the Finnish request in fact contains the element of reasonableness in itself. This it tries to disguise by pretending that the measures requested would be the simple cessation of all works. This is a very convenient interpretation to take, as it will allow Denmark to embark upon what we must regard as the core of its argument against the indication of interim measures, namely the argument that the measures, if granted, would be wholly out of proportion and put a completely unreasonable burden on Denmark.

Thus, we heard Mr. Magid set out the enormous losses and "substantial economic and social damage (CR 91/11, p. 31) that would be entailed, as he put it, "in the event of a suspension of the Great Belt project" (*ibid.*). A complete cessation of the motorway part of the project for three years would amount to US$500 million, plus very extensive losses for the public and private sectors with investments dependent on the continuation fo the project. Professor Bowett, likewise, spoke of a "total stoppage of all further construction work" and its "devastating effect" (CR 91/12, p. 21).

All of this, I submit, completely ignores the terms of the Finnish request and the arguments Denmark has itself put forward about the absence of urgency and irreparable harm in this case. It is a tactical move to put Denmark in the position of the unfortunate underdog, whose present plans are being "interfered with" (CR 91/11, p. 9), as Ambassador Lehmann put it, by Finland, or, rather, not really Finland at all but by what Professor Bowett called a capitalistic company's private interest.

The matter starts to look now as if it were Finland that aimed to change the existing situation. There is no word about Finland's right of passage and the importance of that right, not only to Finnish society but to the continued enjoyment by all States of this right. I need hardly point to the consequences, if the straits regime generally would be looked at from the perspective which Denmark has taken: its point is that there is a right of innocent passage and that is, as paragraph 103 of the Written Observation puts it, "all there is".

Having painted that distorted picture of the present case and of Finland's position in the matter, Denmark then proceeds, in the different parts of its argument, to seek to demonstrate that the Finnish claim is unjustified — indeed, its own argument presses it so far as even to hint at the extreme position that there might be some kind of wrongfulness entailed by starting this legal action. Thus, Denmark argues about proportionality, reasonableness, balancing of interests, etc. — all considerations which seek to divert attention from the law — i.e., Article 41 of the Court's Statute — to equity and economic considerations.

I do understand that Denmark might feel it reasonable that Finland proposes one concrete alternative on how the Finnish rights could be safeguarded.

I have earlier sketched, with some hesitation I might add, three such alternatives together with their cost-estimates and I have done this to show that Finland is prepared to participate in technical discussions. But I have a feeling that Denmark will come tomorrow with the reply it has given us whenever we have suggested these alternatives: a blanket denial of the possibility to realize the suggestions and a dogmatic insistence on going ahead with the already established plans.

Denmark's straw man construction also belies its claim that there is not even a prima facie right by Finland and, as Ambassador Lehmann argued, "not even a prima facie case exists in favour of Finland's contention". This is an interesting statement from someone who has written in a recent textbook, together with two other eminent Danish authors, that not only is there a right of free passage in the Danish straits and that there is no right to barrage these straits but that:

> "it is all the less permitted to prevent navigation through straits by the construction of bridges, tunnels or other such installations. The construction of such installations in the main channel of a strait must therefore take into account the largest existing ships" (*Folkeret*, Klaus Gulmann, John Bernhardt, Tyge Lehmann, Copenhagen 1989, original in Danish).

It has been a consistently held Danish position ever since it was laid down in Max Sorensen's statement to the Danish Great Belt Committee in February 1957 that there is a right of free passage in the Danish straits and that this right extends to all existing ships (cf. Appendix to Annex 26 of the Report of the Great Belt Committee; see also his statement of 29 January 1962, published in Danish in *Fast Forbindelse Over Store Baelt*, Betaenkning No. 508 (1968), pp. 109-112). In view of such statements, whatever one thinks the final judgment should be, the Finnish right clearly possesses a prima facie validity. Even from the Danish perspective — that is to say, even if we grant the correctness of the view held by Max Sorensen and Tyge Lehmann — the only open question would seem to be whether drill ships, semi-submersible drill rigs and heavy-lift ships are "existing ships" in the meaning of the Danish doctrine. There is nowhere a suggestion that the right of free passage would not exist, or would exist only for some categories of activities or ships.

Now throughout our contacts with the Danish side, it has been argued consistent with that Danish doctrine — that the craft moving in and out of Finland are not ships, and that they do not therefore enjoy the right of passage. We have not really heard that argument here, though Ambassador Fergo attempted to belittle the importance of several conventions which unambiguously consider moving offshore craft as ships. The Danish side has not been impressed by the argument that even the International Registry of Shipping of Denmark lists these craft as ships, as do the registries of all the Nordic countries and that many recent academic materials have been published in all the Nordic countries in which the position has been taken that these craft either are "ships" or that, at least, the same rules of navigation should be applied to them as are applied to regular ships. Indeed, if these rules were not applied to them it is difficult to see how they could move — and could have moved — at sea at all.

All this is merits, of course, and I do not wish to dwell upon it longer. I have made these points only to show how inconsistent the view is that there is not even a prima facie case in Finland's favour with what I have called the Danish doctrine. The merits of this case will not turn on whether or not there exists a right — we agree on free passage — but on how that right should be interpreted, whether it should be extensive or narrow and whether it should be applied to certain craft which have always enjoyed it everywhere, including in Denmark's territorial sea. To my knowledge, there is not a single case, not one example from the practice of any country in which the rights of passage of the kinds of craft manufactured in Finland would have been effectively denied.

I will now move to the second point: the question of the alleged Finnish acquiescence. First, of course, I have to add that I do this with some unease as it is so obviously a question of the merits. But I shall address it anyway as it has been consistently claimed from the Danish side that Finland has agreed — albeit silently — in the cutting off of the possibility of free passage by some ships manufactured in it from travelling beyond the Baltic.

It is clearly one of the principal substantive contentions of Denmark that, as formulated by Ambassador Lehmann:

> "the Danish circular Note of 12 May 1977, notifying foreign States about the then ongoing project to construct a high-level bridge across the Great Belt, was left unanswered by Finland" (CR 91/11, p. 10).

This is then taken to signify that Finland saw no problem in the then ongoing project because, as Ambassador Lehmann observed, Finland did not respond according to the normal practice within a year's time.

Let me first note that there is no particular magic in the year 1977. The first plans for a bridge originate in the 1930s. The Governmental Committee was set up in 1948 and made a report in 1960 in which a high-level bridge was suggested. Several studies on the matter were carried out during the 1960s and 1970s and different technical alternatives appeared and disappeared. The law on which the 1977 note was based had been passed four years earlier, signifying that there hardly was any particular rush in the project itself.

I would then wish to make three points. First, that project was substantially different from the present one. This seems to be admitted by Ambassador Lehmann as well when he does not refer to 1977 as *the* project but the "then ongoing project". Indeed, that project provided for a high-level and a low-level bridge, whereas the project initiated in 1987 contains the two alternatives of a high-level bridge and a tunnel in the East Channel. That the later project is a different one, is perhaps best manifested by the fact that the Danish Government felt it necessary to inform foreign missions anew. And of course this was the correct procedure as the law on which it was based as well as the modalities provided by the new law were completely different from the old one. Consequently, the old law (No. 414 of 16 June 1973) was completely repealed, not modified by the new law (Law No. 380 (1987)). The tunnel alternative was envisaged by the new law, I understand, as a prerequisite for a political consensus between the major parties in Denmark, out of which, for instance, Venstre, had been opposed to the bridge project.

Second, as we have already noted, the 1977 project was hotly contested in Denmark from the outset. A motion for the suspension of the project was made in the Danish Parliament already in 1976 and thereafter motions for suspension were taken up, as noted in the Parliamentary debate by Mr. Jorgen Fredriksen about every six months.

The Danish Note of June 1977 was sent to Foreign Missions in the midst of a political controversy. A new proposal to suspend the project was debated in the Parliament on 28 October 1977 and after a lengthy debate the matter was sent to the committee of public works. That proposal was finally rejected in March 1978. Nevertheless, political discussion continued among the main parties and within the political-economic committee of the Parliament. Finally an agreement was reached on 30 August 1978 that the project be suspended. The same day the Danish Prime Minister informed the public that an agreement had been reached between the Social Democrats and Venstre to suspend the project *sine die* (udskudt pa obestemt tid) as stated in *En redogørelse for Statsbroen Store Baelt*, page 18. The final decision on suspension, which contains no reference to any period that the matter might be taken up was then made on 19 October 1978. Under such circumstances, I submit, there was already at the very moment the Note of June 1977 was received, a reasonable expectation that the project — like all the projects preceding it — would eventually be abandoned. And this expectation was of course finally fulfilled.

Third, in the ten years between 1977 and 1987, 13 Finnish offshore craft passed through the Danish straits. Surely whatever implied consent it might be argued Finland had given in 1977 must be deemed to have expired by the continuous passage of such ships. In particular, as I noted on Monday, important investments were made by the City of Pori as well as Rauma-Repola Offshore to provide for the continued production of large offshore craft in its shipyard.

Taking into account the continuous use of Finnish offshore craft of the Danish straits, one might in fact be tempted to turn the argument about acquiescence on its head. Is it not really Denmark which has acquiesced in the passage of such craft in the Danish straits? That the Danish authorities knew about the passage of the rigs there can be no doubt. Also, there is no report of these authorities having ever intervened in any way to argue that these craft did not possess the right of free passage. So I believe that in fact the better argument is the one this Court used in the case concerning *Right of Passage over Indian Territory*, where certain kinds of Portuguese passage "were not subject to any restriction, beyond routine control", and in which there had been established thus a "constant and uniform practice allowing free passage between Damao and the enclaves" (*I.C.J. Reports 1960*, p. 40). Whatever the differences between that case and the present, it seems difficult to ignore the silence of the Danish maritime officials and other Danish officials in face of a continuous practice taking place right under their eyes.

But that of course, again, is a matter for the merits.

Our opponents have likewise argued about acquiescence in respect of the Note of 30 June 1987. Here, however, there can scarcely be talk of any Finnish consent for the reason that the note provided for a tunnel alternative and that it made express provision for the preservation of existing maritime rights. The note read:

> "In case a bridge solution is selected, the erection of the bridge section crossing the Eastern Channel will, in conformity with international law, allow for the maintenance of free passage for international shipping as in the past."

In this way, there was no reason to believe that the continued passage of drill ships and oil rigs would be prevented by the future bridge. That became clear only in the note of 24 October 1989 — by which time the Finnish concerns had already been communicated to the Danish Ministry of Foreign Affairs.

In this way, Finland cannot accept the contention that it has consented to a limitation of its rights by the Danish action. Finland most certainly has not consented to the present Danish project whatever highly speculative inferences our Danish colleagues may make about the events of 1977 and 1978. Since the summer of 1989 in fact continuous contacts have taken place between Danish and Finnish authorities on the bridge, as I explained in my opening statement. The statement on paragraph 38 which refers only to the final Finnish note of protest of May 1990 paints an inaccurate picture of the events. It also sets aside the well-known fact that contacts between Nordic countries and governmental authorities in this kind of matter — as really in any matters — are conducted on the basis of extreme informality; a formal note of protest between the two Nordic States is, I must say, an event of extreme rarity.

Finally, let me come to another matter which has been taken up by our Danish colleagues. It has been argued by them that none of the parties to the Copenhagen Treaty have reacted to the Danish plans and that:

> "The Parties to the 1857 Treaty have accepted a clearance of 65 metres as being sufficient for the exercise of their right of passage through the Danish territorial sea." (CR 91/11, p. 63.)

This is not correct. The Soviet Note Verbale of 29 March 1978 does not end with the suggestion of 65 metres. After the paragraph in which that minimum height is noted, the note continues by an expression of anxiety:

> "because the Danish side, while preparing these plans, has not paid due attention to the question concerning the safeguarding of unhampered passage through the Great Belt for traffic" (cf. Annex 8 of the Danish Written Observations).

Thereafter follows a listing of the different obstacles that the bridge will anyway cause to navigation in the Great Belt and finally a request for more information so that the Soviet authorities could "scrutinize in more detail the subsequent questions and submit their viewpoints thereon". Rather than an expression of consent to the bridge plan, the note in fact lays down several grave reservations against it and clearly leaves the consent of the Soviet Union to be dependent on the two States' future exchanges. No such exchanges, I believe, have taken place — at least not to the extent that the Soviet Union might have been held to have consented to the Danish plans. As it is said on page 38 of the *Redogørelse for Broen* — a Final Report which I already referred to — "reactions gave no reason for changes in the project".

The Soviet Union has continued to express its anxiety over this projects. In the most recent session of the Council of the International Maritime Organization (IMO), held in London on 10-14 June 1991, the Soviet Union expressed its concern over the restrictive effects of the planned bridge and put forward the view that Denmark should reconsider design of the planned bridge. That country also suggested that the matter should be looked into by the legal committee of the organization. The following decision, I believe, was made at that session:

> "On the issue of the construction of a fixed bridge over the Great Belt, the Council took note of the concerns which had been expressed and requested the Secretary-General to keep the matter, which is before the International Court of Justice, under review and inform the appropriate bodies of IMO."

The Council made the only appropriate decision in the matter — to defer it until the decision of this Court. But my point is that the bridge project has not gone unchallenged and that there is a challenge to its very legality by at least one country which is also an original party to the 1857 Treaty.

Now lastly, Mr. President, Members of the Court, let me draw your attention to some of the more technical aspects of this case which came out during last Monday's and Tuesday's discussions. I shall briefly make some points on four sets of technical aspects.

First, let me take the question of the offshore rig market situation and Rauma-Repola Offshore's outlook.

The market is — like most markets — very cyclical in nature. Ten years ago — during the previous peak — over 200 rigs were under construction. The period 1986-1990 was particularly difficult: only 14 orders were made. Today the number has gone down to ten. Of these ten, as was explained on Monday, Rauma-Repola is the builder of three. In addition a contract for a fourth one has been signed. In fact, the company is today the leading offshore exploration rig builder in Europe.

What reason is there to be optimistic about the future trends, then? What is the basis for the calculation of the company's situation in the 1990s? Now, the average age of an offshore drilling unit is about 20 years (Source: *Offshore Rig Newsletter*, July 1989). Out of the present 641-unit fleet of existing jack-ups and semi-submersibles, 403 will be reaching the age of twenty years during the forthcoming ten-year period. Moreover, encouraging information about additional investments by oil companies is provided in many places (e.g., *Ocean Industry Magazine*, February 1991). Professor Bowett asked — rhetorically, I am sure — the question whether it might be possible that the demand for oil rigs will shift to the Far East. Well, we do not really know. But we have no reason to conjecture in such a fashion, as what we do know is that the largest offshore deposits are to be found outside the coasts of Northern Europe.

Another set of questions related to the draughts of the Rauma-Repola built oil rigs and the ways they have taken to pass to their buyers.

And here, Mr. President, I am afraid I now have to show pictures[1].

Picture No. 1

In this first picture we have listed the 20 oil rigs and drill ships which have travelled through the Danish Straits. One (RR-8) could have passed through the Great Belt had the fixed link been in existence already. One of them passed through the Sound (RR-6). The rest have either passed through the Great Belt or we have not yet received information about their actual routes. You will also see the dates of delivery and the actual draughts of these vessels, as established at shipyard at delivery. As regards the possibility that some of them could have passed through the Sound, I refer to Dr. Koskenniemi's statement on Monday.

Picture No. 2

But the issue is not only about rigs and ships actually built. The problem concerns also rigs as regards the future, particularly rigs tendered. Here are some examples of such vessels with their air and water draught. The company continues to make tenders on these types of craft.

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[1] Not reproduced.

Picture No. 3

Another question that was posed to us by our opponents and in particular Professor Bowett (CR 91/11, p. 13) related to the basis of our calculations relating to the additional costs of US$7.5 million to 14.5 million regarding the disassembly and reassembly of the derrick in case the fixed link would be in existence. Rauma-Repola Offshore constructs heavy rigs for harsh environments. Consequently, the derricks are also heavy and not designed for quick assembly. It should be noted that, before the transportation, the rig has to undergo extensive inspection and test runs. These runs will have to be made anew after the reassembly. In this picture we have explained the calculatıons regarding the four additional months it takes to disassemble and reassemble the derrick of a semi-submersible.

Picture No. 4

Here is the basis of the calculation for the sum of US$14.7 million regarding the disassembly and reassembly of the rig. The calculation is based on all the operations being done by Rauma-Repola Offshore personnel and equipment.

Let me then answer Professor Bowett's question: "Do we know why they cannot be towed through the sound by shallow-draught vessels? We do not." (CR 91/12, p. 15.) But we do know. The answer is simple. Transport by towing creates a risk of accidents which is about *20 times as high* as the risk in transport by a heavylift ship (Source: *Accident History of Mobile Rig Fleet*, Offshore Data Services, Houston). There have so far been too many accidents relating to towing of offshore vessels.

My second set of brief answers relates to the question of bridges. As regards the two Bosporus bridges, the first one of them was built in 1973. At that time, there were no ships which would have needed a higher clearance than the present one and which would have needed to travel to or from the Black Sea. The height of the first bridge naturally prejudiced the height of the second. As regards the Kan'mon Bridge in Japan, let me note that the situation is completely different from the Baltic. That bridge can always be evaded by detouring around Kyushu Island. Our colleagues left shyly unmentioned the similar situation at the other end of Japan's main island, Honshu, where a tunnel is constructed to lead to the Island of Hokkaido. The Verrazano Narrows Bridge in New York, the Golden Gate Bridge in San Francisco and the various other bridges referred to have only local — sometimes national — influence in a limited area. If, however, we wish to embark on listing bridges, then, for perfection, also the Tagus River Bridge in Lisboa which stands in 72 metres height, should be mentioned — as well as the non-existent Channel bridge.

All in all, we cannot infer a customary law standard merely from the existence of a set of bridges at a certain height. There will always be some bridges that are higher than other bridges and many bridges of a similar height, but to attach that fact with juridical significance without any additional proof of the *opinio juris* is simply a mistake.

Finally, as the last of my factual points I would like to present five additional technical alternatives for how Finland's rights could be safeguarded by modifications in the bridge project:

1. Replace two spans with a pontoon bridge in the Western Bridge

The basic idea of this is that when the bridge opens, the pontoon part will be moved aside in its entirety. It is a reasonable cost alternative whose main difficulty is the general difficulty of opening a railway bridge. However, additional cost should not be more than around US$25 million plus the costs of the additional dredging in the Western Channel.

2. Move two spans aside by means of pontoons in the Western Channel

The advantage of this alternative is that the appearance of all the spans remains the same while the disadvantage is that the opening process is expensive and time-consuming. However, if it would be only rarely used — as it probably would — this should be no unsurmountable problem. Its cost would be around US$35 million plus the dredging.

3. Split two spans and turn them to the side in the West Bridge

The advantage of this option is that opening could be done relatively quickly. The problems would relate to expansion joints being perhaps problematic. The additional cost would be around US$30 million plus dredging.

4. Construct the East Bridge as a bascule bridge with intermediate joints across the East Channel

This could be done by replacing one span by what is called a pylon-supported truss bridge which when opened bends at two points in each half of the span. This would allow passage in the Eastern Channel. It would be a technically demanding and untested structure. It requires the changing of the main design into a shorter suspension bridge or a cable-stayed bridge. The additional cost of this structure would be perhaps around US$50 million.

5. Finally, there is the continuously present alternative of the tunnel

This would be the Channel alternative; tested elsewhere and still much supported in Denmark — in particular by the national so-called tunnel-group. The additional costs would, as Mr. Magid told us, be less than US$200 million.

Mr. President, Members of the Court, I have wished to answer some of the technical points and present some of the alternatives here in order to show that Finland continues to be seriously seeking for an acceptable solution. Of necessity, this overview has been brief and summary. I hope that the materials nevertheless have given light to some of the questions which may have arisen. Let me note, however, that the main substance of our present dispute continues, for Finland, to remain outside economic calculations and technical alternatives. The dispute is about the freedom of passage. If we have wished to go into technical detail that is not to imply that the relevant law would be found there, but that we have given much thought to understandable economic concerns in the Danish society.

I have dwelled at some length on four issues: the distorted perspective that our opponents have wished to present of what they wanted to call the "real object" of these proceedings; on the question of the prima facie right; on the Danish claim regarding acquiescence and on some of the technical points that were raised on Tuesday. The first and the fourth are properly matters for this stage of the proceedings. The Court's jurisprudence requires clarity over what are the rights at issue in the proceedings and the conditions for granting provisional measures require that we go to some extent into technical detail. The second and third questions are, I submit, matters relating to the merits of the case. If I have ventured to discuss them here it is only to show that the substance of the Danish case is far from being so strong as they have assumed and that there is absolutely no reason to believe that Finland is here seeking anything else than what it has repeated it seeks: an order for the protection of the right of free passage which has been hitherto enjoyed continuously by all ships entering and leaving Finnish ports and shipyards.

Thank you. I thank the Court and would like to ask to call on our counsel, Sir Ian Sinclair.

REPLY OF SIR IAN SINCLAIR

COUNSEL FOR THE GOVERNMENT OF FINLAND

Sir Ian SINCLAIR: Mr. President, Members of the Court, with the permission of the Court, there are several observations I would wish to make this morning on the presentation made to the Court on Tuesday by my learned friends Dr. Jiménez de Aréchaga and Professor Bowett. I will first of all make some general remarks about what appear to be certain underlying assumptions in those presentations — assumptions which, I may say, are wholly unjustified. Thereafter, I will concentrate on responding more specifically to the arguments advanced by Professor Bowett on "irreparability" and on "urgency".

In the first place, Professor Bowett makes the basic assumption that the request for interim measures which Finland has made is "for the protection of the economic interests of the Finnish company Rauma-Repola Offshore". In a sense what I am about to say will repeat, in slightly different language, what Ambassador Gronberg has already said. In fact, Professor Bowett's statement mischaracterizes completely the nature of the Finnish request, and indeed of the Finnish Application. In this case, there is a dispute about the *scope* or extent of the right of free passage through the Great Belt. It is a genuine, and in no sense a manufactured, dispute. Denmark asserts that, as the territorial sovereign, it is perfectly entitled to build a fixed link across the Great Belt in pursuance of a wide-ranging plan for the economic development of Denmark. Finland does not dispute that Denmark is in principle so entitled, but maintains that Denmark's entitlement so to proceed is limited by its obligation to respect the principle of free passage through the Great Belt — a principle you may note whose existence Denmark does not deny, but whose scope is in dispute between the Parties.

By way of illustration of the problems which the Danish Great Belt Project poses for Finland, and indeed for other States, Finland has pointed to the particular difficulties which completion of the project, in its presently planned form, will present for the Finnish offshore oil rig industry. It has of course, in a sense, been necessary to do so, given the need of Finland, in the context of a request for provisional measures, to establish that "irreparable prejudice" is being, and will continue to be, caused to Finland by completion of the East Channel Bridge in its presently planned form.

That Finland is not the only State in the Baltic which has expressed concern about the more general consequences of the Great Belt Project for the right of passage through the Great Belt is confirmed by the reaction of the Government of the Soviet Union to the Danish plans, not only in direct contact with Denmark, but also within the framework of current discussions within the International Maritime Organization. Ambassador Grönberg has already drawn attention to this aspect of the matter, so I will not enlarge on it.

The dispute, therefore, is *not* about the economic interests of the Finnish oil rig industry; it is about the *scope* of the right of free passage through the Great Belt. Finland contends that this right extends to drill ships and oil rigs manufactured in Finland, which have, as the Court will have noted, in practice enjoyed and exercised the right of free passage for nearly 20 years. Denmark denies this, arguing that the right of free passage does not extend that far. Finland also contends in its Application (but *not*, and I repeat *not*, in its request for provisional measures) that the right also extends to "reasonably foreseeable" ships. This is even more vigorously denied by Denmark. This then is the nature of the dispute which is before this Court, and no other.

Now, I turn to a second point. In his presentation on Tuesday, my friend Dr. Jiménez de Aréchaga, I may say with his customary elegance and discretion, effectively accused me of adopting what he described as a "comfortable position" by refusing, at this stage, to enter too much into the merits of the present case. But the so-called "comfortable position" is effectively dictated by the jurisprudence of the Court, which I sought — I hope fairly — to analyse in my opening statement. The fact is that the Court has been very careful indeed to refrain from any preliminary determination of the merits of a case at the stage of an application for interim measures. Sztucki, who wrote the book *Interim Measures in the Hague Court* in 1983, under the heading of "The Merits of Principal Claims" observes — and here I have a slightly lengthy quotation for you:

> "From the theoretical and formal point of view, this factor is, in principle, irrelevant [irrelevant, note]. The law of the Court does not require that the applicant and requesting States show a prima facie case and, accordingly, as a rule, they do not argue this point."

I might just interpolate in the middle of that citation that, in the light of what has happened on Monday and Tuesday of this week, perhaps Sztucki might have slightly amended that passage. However, I revert again to the quotation. Sztucki goes on to say:

> "Consequently, the Court does not have sufficient basis to assess whether a prima facie case exists or not. Also, from the material point of view, attempts to determine the existence of a prima facie case *in limine litis* would be of doubtful value in the case of the Court. For the very nature of inter-State disputes is usually complex and the legal positions of the litigants who can rely on the most competent legal expertise are more often than not fairly balanced." (Sztucki, *op. cit.*, p. 123.)

Now, having said this, one could perhaps envisage that, in very exceptional cases — I repeat, very exceptional cases — the Court might be capable of being persuaded that an alleged right of an applicant State on the merits of the case is so "manifestly unfounded" — to use the language of the European Convention on Human Rights — so obviously lacking in foundation in public international law, that it ought not to accede to any request for an indication of interim measures to protect that alleged right. But that, I would submit, is certainly not the case here. Some analogy can be drawn from the Court's jurisprudence on the prospects of substantive jurisdiction where a request for interim measures of protection is made. Where the Court will obviously be without jurisdiction to hear the merits, or in all probability will be without jurisdiction — but where there is just a remote possibility that jurisdiction might exist — the Court may be reluctant to indicate interim measures. I did not review this jurisprudence in my earlier statement this week, and I do not intend to do so today because, of course, in the present case, no issue of uncertain jurisdiction arises. But it will, I trust, be obvious to the Court that, even applying this analogy — and I may say it is a very imperfect analogy, since absence of jurisdiction will preclude the Court from giving judgment on the merits — the circumstances of the present case are such that the Court should not heed Dr. Jiménez de Aréchaga's siren-call of going too much into the merits. Of course, in his presentation this morning, Ambassador Grönberg referred to certain matters relating to the merits, but that was simply because these matters had been raised in a very controversial manner by our opponents on Tuesday.

So, it is in this context that I am bound to take issue with the argument advanced by my learned friend, Dr. Jiménez de Aréchaga, that — and here I quote from page 48 of the Verbatim Record of the morning sitting on 2 July —

> "the right claimed by the applicant State constitutes one of the circumstances, perhaps the most important one, to be taken into account in determining whether interim relief should be granted or refused" (CR 91/11, p. 48).

In challenging that submission, I do so, inevitably, with some trepidation, given the authority which he commands as a former President of this distinguished Court. But, Mr. President, I do so nonetheless with conviction and, indeed, with confidence. The Court should not — and its jurisprudence confirms this — enter into the merits of a particular case at the stage of deciding whether or not to indicate interim measures. The only qualification I would make on that proposition is the very exceptional case I have already mentioned. But, as I say, that very exceptional case is not present here. Finland, accordingly, does not accept the proposition that the right claimed by the applicant State constitutes one of the circumstances to be taken into account in determining whether interim relief should be granted or refused, save in the very exceptional case to which I have drawn attention, a case which, I might add, has never yet arisen in the practice of the Court. Mr. President, my learned friend, Professor Tullio Treves, will be elaborating on this aspect of the Danish argument.

I turn now to the arguments advanced by Professor Bowett on "irreparability" and "urgency". Professor Bowett's arguments on irreparability are largely conditioned by his view, which I have already discussed, that the present case is not about the scope of the right of free passage through the Great Belt but about the protection of the economic interests of Rauma-Repola.

Now, Professor Bowett and I obviously differ as to the conclusions to be drawn from the jurisprudence of the Court on interim measures. Professor Bowett would wish to see a reversion to what I termed in my opening statement "the irreparability in law criterion", first developed by President Huber in the *Sino-Belgian Treaty* case. He refers to those cases in which the Court has indicated interim measures in circumstances where the Court was persuaded that interim measures were called for in order to guard against "danger to life and health" (the *United States Diplomatic and Consular Staff in Tehran* case), to protect "the rights of Nicaraguan citizens to life, liberty and security" (in the case of *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*) and to prevent the exposure of persons and property to a "serious risk of irreparable harm" (in the *Burkina Faso/Republic of Mali* case). But, as the Court well knows, these are certainly not the only circumstances in which the Court will grant interim measures of protection. Professor Bowett seeks to distinguish those cases in which interim measures have been awarded in other circumstances, that is to say, the *Anglo-Iranian Oil Co.* case and the *Fisheries Jurisdiction* case. He suggests that the order on interim measures in the *Anglo-Iranian Oil Co.* case is perhaps best explained by Iran's failure to appear and contest the United Kingdom request. Now, I must submit with respect that this explanation does not carry conviction. The Court generally affords ample protection of the interests of a non-appearing party. In general terms this is the clear object and purpose of Article 53 of the Statute. Now, of course, the better view is almost certainly that Article 53 of the Statute is not applicable at the interim measures stage. It certainly cannot be applied literally, since paragraph 2 of Article 53 requires that, in a case of non-appearance, the Court must, before deciding in favour of the claim of an applicant State:

"satisfy itself, not only that it has jurisdiction in accordance with Article 36 and 37, but also, that the claim is well founded in fact and law".

The Court will well be aware that these are not the conditions which have been applied or should be applied, to justify the making of an order indicating interim measures. The jurisprudence of the Court is quite clear on this point. This having been said, the Order of the Court on interim measures in the *Anglo-Iranian Oil Co.* case cannot be explained away on the basis of Iran's non-appearance if, as Professor Bowett would have us believe, the Court has consistently applied the absolute irreparability in law criterion for the grant of interim measures, that is to say, by refusing to grant them in those cases where financial compensation might be a possible remedy. Nor, with respect, is Professor Bowett's explanation of the Court's Orders on interim measures in the *Fisheries Jurisdiction* cases persuasive from this point of view. The damage done to United Kingdom and German fishermen in the *Fisheries Jurisdiction* cases was no doubt quite considerable, but it was no more drastic than the damage which will be done to the Finnish ship-building industry in the present case if the Great Belt project is completed in its presently planned form. Finland accordingly continues to rely on the analysis of the jurisprudence of the Court presented in my opening statement of 1 July, as amplified by the additional points which will be made by my learned friend, Professor Treves.

Two final observations on the irreparability point:

(1) Professor Bowett's argument presupposes that the injury caused to Finland by completion of the bridge project in its presently planned form can be adequately compensated by an award of monetary damages. But this, of course, is based on the misconception that Finland's purpose in instituting the present proceedings is simply to protect the economic interests of a Finnish company. Finland's purpose, of course, is much broader. It is to try to obtain a limited modification of the Great Belt Project so as to secure continued access to and from Finnish ports and shipyards of special ships whose height may exceed the 65 metres clearance height of the proposed bridge. That is why the dispute is about access and about the extent to the right of free passage, and not about compensation.

(2) For the Court to resile from the position it has consistently taken in its more recent jurisprudence whereby irreparability connotes irreparability *in fact* or in law, would be a thoroughly retrogade step. The test which the Court now employs, and I explained this fully in my opening statement, is that a prejudice is irreparable if it makes impossible full execution of the final judgement if in favour of the applicant State, and this without reference to whether the applicant State might at some future stage be compensated for the injury it has suffered. I would submit that to abandon that test would be to deny the very object and purpose of interim measures as *conservatory* measures designed to preserve the respective rights of the Parties pending a final judgment. I would also submit that it would in addition be a standing invitation to States to go ahead with what the Court may subsequently determine to be internationally wrongful acts on the basis that such acts could be remedied at a later stage by compensation and by compensation alone. I would submit that the Court should not countenance such a limitation upon its discretion.

I now turn slightly more briefly to the argument of urgency. Ambassador Grönberg has already dealt with the argument based on Finland's alleged acquiescence in the bridge project. How can Finland be said to have acquiesced in the construction of a bridge over the Great Belt with a clearance of 65 metres when, until October 1989, no final decision had been taken to build a road bridge rather than a tunnel, which obviously would have presented no major problems to Finland. Professor Bowett suggests that — and here again I quote from his presentation "it was clear much earlier that a bridge was the more likely option".

But is this right? Finland can no doubt be presumed to have had at least some knowledge of the project for a fixed link between England and France across the English Channel which was under consideration in the early 1980s. Finland therefore would have known that the project for a bridge over the English Channel, or even a combined bridge/tunnel, was eventually rejected by the two Governments for a number of reasons. I will not elaborate on all these reasons but one them was certainly the need to ensure the safety of shipping in a notoriously crowded strait. May I say that, in drawing attention to the fixed link across the English Channel, I am not suggesting, on behalf of Finland, that any real parallel can be drawn between the two cases. The factual and indeed the geographical circumstances are quite different. But I am simply drawing attention to the fact that rejection of the bridge solution in the case of the English Channel fixed link by reason *inter alia* of the difficulties anticipated in securing international agreement to the erection of a bridge hardly indicates that, in the case of the Great Belt, a bridge was the more likely option.

As to Professor Bowett's second point on urgency, there are clearly differences between Denmark and Finland as to the technical possibilities for drill ships and oil rigs (including semi-submersibles and jack-ups) to pass through the Sound. Ambassador Gronberg has already responded to many of the Danish arguments on this point.

But it is perhaps Professor Bowett's fourth point which deserves most attention. This is of course the argument that there is no urgency because the East Channel of the Great Belt will not be physically obstructed by the bridge until late 1994 at the earliest. But both Dr. Koskenniemi and I, in our earlier addresses, pointed to the inter-relation between the various elements of the Great Belt Project as a whole. That inter-relation has the consequence that completion of any one element would reduce the possibilities of modifying other elements so as to enable effect to be given to any judgment of the Court on the merits, if that judgment were to be in Finland's favour. What particularly struck me about Professor Bowett's intervention was his suggestion that that could mean only that Finland believes that Denmark will not comply with a judgment on the merits against Denmark. I have to say that that is a quite unfounded allegation. The point that Finland is seeking to make is quite different. Finland is of course aware that it would be possible to reconstruct or even *in extremis* to demolish the bridge if the Court were to find in favour of Finland on the merits. But of course the cost to Denmark would then be enormous. The UK/French Study Group on the Fixed Channel Link, in considering the bridge project for the English Channel as recently as 1982, alluded to the possibility that the promoters of the bridge might abandon the site during construction, for example, following long delays or unexpected additional costs. The Study Group concluded — and I have no reason to dispute this — that the cost of demolition could be very high. Finland therefore suggests that it is very much in Denmark's own interest to exercise such restraint in proceeding with construction works in connection with the bridge project over the Great Belt so as to permit full implementation of the Court's final judgment on the merits if in favour of Finland. Finland has no desire to see Denmark landed with such additional cost.

Finally, I turn to Professor Bowett's peroration. Here, with respect, I think there is more than an element of exaggeration. My learned colleague, Professor Treves, will be responding to the charges that we have ignored the "balancing of burdens" notion inherent in the concept that the object of provisional measures is to preserve the respective rights of the Parties. If, as counsel for Finland, I concentrated in my opening statement on the need to protect the rights which Finland claims, that is only natural. It does not mean that Finland is not aware of the rights which Denmark claims in the main proceedings. The *real* issue is that Denmark is inexorably proceeding unilaterally with a construction or series of constructions which pay no attention to the rights which Finland is asserting on the merits. Finland has done nothing save to institute proceedings before this distinguished Court in order to have a declaration upholding the rights which Finland asserts and to have those rights protected by conservatory measures. Finland is of course aware that the grant of conservatory measures by the Court may cause considerable inconvenience to Denmark by imposing possibly some delay in the completion of the project, and possibly some additional cost. But, Mr President, Members of the Court, with all respect, Denmark has brought this difficulty upon itself. Finland has always been prepared to negotiate with Denmark on possible modifications to the Great Belt Project which could protect the right of free passage for which Finland contends. Unfortunately, Denmark has refused hitherto to contemplate any modification. Finland takes no pleasure in these proceedings against a fellow Nordic country, but has felt it necessary to come to this Court seeking protection for the rights it is asserting in the proceedings on the merits. There may indeed be a balance to be struck by the Court in determining what, in these circumstances, should be done to respect the respective rights of the Parties. But, in seeking that balance, the Court will certainly have to bear in mind that Finland is presently the victim, I might say the innocent victim, of a project initiated by Denmark alone. This is a project which I do not dispute will carry great benefits for Denmark, but it is a project which, in Finland's submission, is clearly restrictive of the internationally recognized right of free passage through the Great Belt and which, if completed in its presently planned form, would cause serious and lasting injury to the Finnish shipbuilding industry. Thank you Mr. President.

The Court adjourned from 11.40 to 11.50 a.m.

REPLY OF MR. TREVES

COUNSEL FOR THE GOVERNMENT OF FINLAND

Mr TREVES : Mr. President, Members of the Court, it is a great honour for me to appear before this Court and I am grateful to the Government of Finland to have made it possible. As this is the first time that I take the floor before this Court, let me say that for international lawyers of all generations, and certainly for me, this Court embodies the finest tradition and the highest hopes for progress of international law.

The task that has been entrusted to me is to reply to those of the legal arguments put forward by Denmark in its Written Observations and in the pleadings of its Agents and counsel which have not yet been addressed by my colleagues this morning.

The general impression which emerges from reading the Danish Written Observations and from listening to oral pleadings on Tuesday is that the defence of Denmark tries to transform the discussion of the Finnish request for interim measures into a discussion of the merits of the case. In doing so, without saying it explicitly, Denmark also tries to insinuate the thought that Finland's Application is frivolous, that it amounts to an abuse of the process of the Court.

This general impression is substantiated in the analysis of the various points of law which I shall consider this morning. These points are the following.

First, the contention, developed in particular in President Jiménez de Aréchaga's pleading, that the right claimed by Finland in its Application, and which Finland would like to see preserved by the indication of provisional measures, does not exist.

Second, the contention, put forward by Professor Bowett, that the alleged lack of consideration, in the Finnish request, for the Danish interests, would have the consequence that the requirement of proportionality would be missing.

Third, I shall address the alternative request of Denmark, illustrated by Mr Magid in his second pleading, that, in the event that the Court should grant the request for interim measures in whole or in part, it should also indicate that Finland shall undertake to compensate Denmark for losses incurred in complying with the measures should the Court reject Finland's submissions in the merits.

I. THE ALLEGED NON-EXISTENCE OF THE FINNISH RIGHT

To consider this aspect of the Danish position, it seems useful to start from the analysis of Article 41 of the Statute made in paragraph 83 of the Written Observations. According to Denmark, the object of Article 41 may be summarized by distinguishing three elements : firstly, the object to preserve the rights of the Parties ; secondly, certain requirement which the power of the Court to indicate provisional measures would "presuppose" — namely irreparable prejudice, urgency and prima facie existence of the jurisdiction of the Court ; and, thirdly, that circumstances require the indication of the measures. To present the prospects of substantive jurisdiction as a "precondition" and not as a "circumstance" may be helpful, and the point was made by Judge Mosler in his separate opinion in the *Aegean Sea Continental Shelf* case (*I.C.J. Reports 1976*, p. 25). However, to do so as regards irreparable prejudice and urgency amounts to a rather unusual analysis of

Article 41. Indeed the consequence of this analysis is that the very concept of circumstances becomes empty, or at least vague, as it appears in the section on circumstances of the Danish Written Observations — a very brief section which contains what we would more appropriately call "concluding observations".

However, it is humbly submitted, the real purpose of the Danish analysis of Article 41 is to present the rights that are to be preserved with the interim measures as an independent element whose existence has to be demonstrated in order for the measures to be indicated. It is true that the section of the Written Observations relating to this element is entitled to the "alleged" right. By doing so the Danish Written Observations merely pay lip service to the proper role which has to be reserved, in the framework of proceedings on provisional measures, to the rights under discussion on the merits. This emerges clearly from the pages that follow in the just mentioned section of the Danish Written Observations. They contain a detailed incursion into the merits of the case. This incursion concludes, in paragraph 140, by affirming that "the right for which Finland seeks interim protection does not exist". One cannot avoid underlining that such an affirmation, in proceedings for the indication of interim measures of protection, is, to say the least, rather startling.

In his pleading on Tuesday, President Jiménez de Aréchaga confirmed and developed the points just mentioned. He affirmed that "the existence of the right claimed by the Applicant constitutes one of the circumstances, perhaps the most important one, to be taken into account in determining whether interim relief should be granted or refused". Starting from this affirmation President Jiménez de Aréchaga embarked on an excursion into the merits even more detailed than the one to be found in the Written Observations.

With respect, this point of departure cannot be accepted and, consequently, it is not necessary to follow President Jiménez de Aréchaga in that excursion.

The existence of the right is not a "circumstance" within the meaning the term has in Article 41 of the Statute of the Court. When Article 41 refers to the "rights" to be preserved through the granting of provisional measures, it refers to "the rights which may be subsequently adjudged by the Court to belong either to the Applicant or to the Respondent", as the Court said in its Order on provisional measures in the *Anglo-Iranian Oil Co.* case (*I.C.J. Reports 1951*, p. 93) and repeated in similar language at various times, more recently in its Order on provisional measures of 2 March 1990 in the case between Guinea-Bissau and Senegal concerning the *Arbitral Award of 31 July 1989* where the Court confirmed that the purpose of exercising the power which Article 41 confers to it is "to protect the rights which are the subject of dispute in legal proceedings" (*I.C.J. Reports 1990*, p. 69).

While President Jiménez de Aréchaga moves into the merits in order to examine the question whether the right claimed by Finland "really exists", Ambassador Lehmann in his introductory statement on behalf of Denmark envisages the right claimed by Finland from a different angle. In doing so he probably reveals the real purpose of this branch of the Danish arguments. He affirms that:

> "not even a prima facie case exists in favour of the Finnish contention that the right of passage through the Great Belt applies to all ships including drill ships, oil rigs and reasonably foreseeable ships"

and that:

> "the Finnish Government must be able to substantiate the alleged right to a point where reasonable prospect of success in the main case exists".

As it emerges from remarks already made this morning by Ambassador Grönberg and by Sir Ian Sinclair it is Finland's contention that to establish whether there is a prima facie case for the existence of the right to be adjuged in the merits phase — or, in other words, whether there exists the so-called *fumus boni juris* — is, in proceedings on interim measures, as inappropriate as to consider the question as to whether the alleged right exists.

Arguments concerning *fumus boni juris* or a prima facie assessment of the merits could make sense if a provisional judgment on the merits were under discussion before the Court. But this is not the case, and cannot be the case, with the proceedings for provisional measures under Article 41 of the Statute. Only in a few individual or dissenting opinions of members of the Court did concerns for the merits emerge in the consideration of requests for provisional measures. Even in the light of these concerns, a recent commentator could not go beyond observing that: "the preliminary view on the merits of the case can marginally play a role in the assessment of circumstances of a case", while confirming:

> "the basically non-anticipatory character of decisions concerning interim protection" (Sztucki, *Interim measures in the Hague Court*, 1983, p. 124, emphasis the quoted author's).

Even though it is not necessary to do so, out of respect for the authority of President Jiménez de Aréchaga, I would like to show that the arguments used to demonstrate that the right claimed by Finland does not exist are, to say the least, questionable and that, consequently, it is out of the question that Finland's case could be considered as prima facie unfounded.

The basic line of reasoning of President Jiménez de Aréchaga's pleading is the following: the 1982 Law of the Sea Convention is not applicable; the Geneva 1958 Convention on the Territorial Sea is applicable, but it is so restricted that it cannot be the basis of the right claimed by Finland; customary law cannot be the basis of a right of transit passage; the 1857 Treaty of Copenhagen does not encompass the right claimed by Finland, and in any case Finland cannot benefit from it as a party but only as a third State beneficiary.

Finland, obviously, reserves its right to examine these arguments in detail at the appropriate stage. For today's purposes it is sufficient to make two points.

The first is that the right of innocent passage as envisaged in the Geneva Convention is a sufficient basis for the right Finland claims for offshore craft and reasonably foreseeable ships. Indeed the "innocence" of such passage has never been questioned. There has been no question of these craft passing through the Great Belt "ex gratia" and not as a matter of right. Consequently, it is hard to see the relevance of the argument put forward by President Jiménez de Aréchaga concerning the right of the coastal State to take steps against passage that is not innocent contained in Article 16 of the Geneva Convention, and almost eliminated in the 1982 Convention. The same can be said about the argument taken from the fact that the coastal State's regulatory powers are broader according to the Geneva Convention than according to the 1982 Convention. These powers may indeed be broader, or at least less clearly defined, but one thing is certain: they concern the regulation of *innocent* passage, not the elimination of the physical conditions for its exercise. Article 15, paragraph 1, of the Geneva Convention, repeated with further clarifications in Article 24 of the 1982 Convention, provides that: "The coastal State must not hamper innocent passage through the territorial sea." It seems clear that to make innocent passage physically impossible is a very radical way of hampering!

The second point Finland would wish to make is that Denmark gives a very partial reading of the 1857 Copenhagen Treaty, and that this reading does not coincide entirely with Danish views on the same subject expressed before the present case arose.

Neither the Written Observations nor President Jimenez de Arechaga quote one of the key substantive provisions of the Treaty. This is the provision contained in Article 1, paragraph 1, according to which "no vessel shall, henceforth, under any pretext whatsoever, be subjected, in its passage of the Sound or Belts, to any detention or hindrance". In its brevity, this provision envisages a passage which (leaving aside the question of warships) is not subject to the limitations and conditions that are found in the Geneva and in the Montego Bay Conventions.

The Danish position, as expressed both by President Jiménez de Aréchaga and by the Written Observations, interprets the 1857 Copenhagen Treaty as an ordinary treaty, which gives rise to rights and obligations only for the parties and whose consequences for third States are only those set forth in the Vienna Convention on the Law of Treaties. This reading seems again a very narrow one, if one considers that the other key substantive rule of the Treaty, namely the abolishing of all customs and dues for ships passing through the Sound or Belts, is established "for ever" and that that very principle has now become a principle of customary law, as evidenced by Article 8, paragraph 1, of the 1958 Convention on the Territorial Sea and the Contiguous Zone, repeated in paragraph 1 of Article 26 of the Law of the Sea Convention of 1982, stating that: "No charge may be levied upon foreign ships by reason only of their passage through the territorial sea."

These elements seem to confirm that the 1857 Treaty is more than an ordinary treaty. The rule according to which passage in the Sound and Belts shall not be subject to any detention or hindrance: "is an expression of a regime of passage through the straits". This quotation is taken from a published intervention made by a well-known Danish diplomat who represented his country at the Third United Nations Conference on the Law of the Sea, Ambassador I. R. Andreasen. He comes to the conclusion that:

> "in the Danish straits a special regime of passage adapted to local conditions has been developed over the years, based on the Copenhagen Convention of 1857, international customary law and national regulations" (*The Law of the Sea in the 1980's*, Choon-ho-Park, ed., 1983, pp. 600 *et seq.*)

Similarly another distinguished Danish diplomat who also represented his country at the Third Law of the Sea Conference, Ambassador Peter Bruckner, stated, in another published intervention, that:

> "The special legal regime governing innocent passage of the Danish straits by all ships has developed over the years based on the Copenhagen Convention. The existing regime is an expression of the general rules of international customary law as reflected in the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone."

It seems hardly necessary to underline that this position is very different from that put forward in the present case by Denmark. Similarly to the Finnish position, the role of customary law is recognized, while it is, and vehemently so, discarded in the positions taken by Denmark in the present dispute.

Moreover, passage through the Danish straits is repeatedly qualified by Ambassadors Andreasen and Bruckner as a "régime". Whatever the exact definition of a régime in international law may be, there can be no doubt that the concept connotes an exception to the application of the ordinary rules on the law of treaties and on State succession to treaties. These are, nonetheless, the very rules Denmark relies upon in its construction of the effects of the Copenhagen Treaty.

Mr. President, Members of the Court, I wish to apologize for having embarked in a rather long *excursus* on a few of the questions pertaining to the merits of the case, which Denmark has raised in its written and oral defences.

Though *stricto jure* unnecessary, this *excursus*, it is humbly submitted, may have served to complete the argumentation put forward this morning by Ambassador Grönberg and by Sir Ian Sinclair to dissipate any possible doubt that the right claimed by Finland is prima facie non-existent.

II. THE ALLEGED LACK OF PROPORTIONALITY

In his pleading on Tuesday, Professor Bowett held in rather foreceful terms the view that there is a requirement of proportionality that the Court must consider in deciding on a request for provisional measures. Professor Bowett then compared the losses Finland would incur in case the measures are not granted with the Danish losses in case the measures are granted and concluded that the latter are by far more important. I shall not go into a discussion of the items involved in his analysis of costs. Ambassador Grönberg has shown that this analysis is, to say the least, questionable.

When closely analysed, the situation does not, it is submitted, justify the clear-cut conclusion that the granting of provisional measures would work only in the interest of Finland. What are, for either party, the advantages and disadvantages involved in the Finnish request for provisional measures?

For the purposes of such analysis it is not sufficient to compare the advantages for Finland of the granting of the measures to the costs for Denmark of complying with them. The analysis must distinguish two hypotheses, namely, that the request is accepted by the Court and that the request is rejected. Furthermore, it must distinguish in either case the hypothesis that the judgment on the merits is in favour of Finland and that it is in favour of Denmark.

If the Finnish request is rejected the disadvantages for Finland would be important: there would be a change in the status quo which would prejudice its rights were the Court subsequently find in its favour. Such change may or may not concern the physical situation in the Great Belt. It would certainly concern the possibilities of Rauma-Repola and other Finnish shipyards to receive and to accept orders for offshore craft. Denmark would have the advantage of being able to act in full freedom while the proceedings on the merits were pending. Such advantage would, however, be rather dubious: action taken in the exercise of such freedom by Denmark would probably make compliance with the judgment — should it be in Finland's favour — more difficult and costly.

Were the Finnish request to be accepted, the advantages for Finland would consist in maintaining the status quo for two or three years, the time it will presumably take for the case on the merits to be brought to its conclusion. During such time no action could be taken or would be taken by Denmark, which could prejudice Finland's rights. Denmark's disadvantages would be modest. This appears in clear light if one recalls the contents of the provisional measures proposed by Finland and the clarifications given this morning by Ambassador Grönberg. These measures do not include the stopping of all construction work: they are limited to those aspects of construction work "as would impede the passage of ships, including drill ships and oil rigs, to and from Finnish ports and shipyards" and the request that Denmark — and I quote again from the Finnish request — "should refrain from any other action that might prejudice the outcome of the present proceedings". These requests leave Denmark with a wide choice of possibilities on how to comply with the measures.

This, it is humbly submitted, is the balance of the relevant considerations. The advantages which, were the judgment on the merits to be favourable to it, may ensue for Denmark from the absence of provisional measures to be complied with appear overwhelmed by the disadvantages which Denmark would incur from not adopting the restrained behaviour which the measures required were the judgment on the merits to be favourable to Finland. Even if, contrary to the assessment given above, the costs to be incurred by Denmark in complying with the provisional measures were to be as important as the Danish advocates have indicated in their pleadings, they would be no different from those Denmark would incur anyhow in adopting the restrained behaviour that it would be prudent to adopt pending the decision of the case on the merits.

In the light of the above considerations, it would seem that, on balance, the conservatory measures requested by Finland correspond also to the best interest of Denmark.

A different conclusion could perhaps be reached only in two sets of circumstances. First, that it appeared manifest that the Court lacks jurisdiction on the merits and, second, that it appeared beyond any reasonable doubt that the Finnish claim on the merits is so unfounded as to amount to an abuse of the process of this Court.

Neither set of circumstances corresponds to the situation of the present case.

As regards the Court's possible lack of jurisdiction, it is totally irrelevant in the present case, in which both Parties accept the jurisdiction of the Court.

As far as the manifest unfoundedness of the Finnish case on the merits is concerned, there is no need to underline once again that in the proceedings on a request for provisional measures no assessment of the merits is called for. The Court has often stated that its decision to grant provisional measures "in no way prejudices . . . any question relating to the merits" (*United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1979*, p. 20, para. 45).

This is as true when the submission is made by application as when it is made by agreement, and is particularly true for a Nordic State as regards the decision to start a case against another Nordic State. This explains also why the case-law of the Court contains, to our knowledge, no precedent where abuse of the process of the Court is considered and why references to abuse of the process of the Court in the legal literature on the Court are minimal. Finland does not believe that the serious character of its Application can be doubted. This is confirmed by the serious attitude taken by Denmark in responding to the present request.

In the light of all the above considerations, Finland feels justified in holding the opinion that the provisional measures it is requesting the Court to indicate correspond to the interests of both Parties in view of the uncertainty, which is inherent to all cases submitted to a judge, with which both are faced as to the contents of the judgment on the merits.

It may be added, should be added, that the provisional measures requested by Finland correspond to the restrained behaviour that is envisaged, on the one hand, in Article 74, paragraph 4, of the Rules of Court, and, on the other hand, in the provisional measure, seldom if ever requested as such by States, but always indicated by the Court, that the Parties ensure that no action of any kind is taken which migh aggravate or extend the dispute.

Of course, Article 74, paragraph 4, of the Rules of Court, concerns a specific situation which is, *ratione temporis*, already behind us. According to this provision:

> "Pending the meeting of the Court, the President may call upon the parties to act in such a way as will enable any order the Court may make on the request for provisional measures to have its appropriate effects."

This power of the President of the Court may be exercised, and has some times been exercised (for instance, in the *United States Diplomatic and Consular Staff in*

Tehran case, *I.C.J. Reports 1979*, p. 10, para. 6) during the time between the request for provisional measures and the decision of the Court on such a request.

The above-quoted provision of the Rules of Court seems to us, nonetheless, to be the expression of a more general principle which applies beyond the narrow time-frame for which paragraph 4 of Article 74 has been drafted. This principle may be stated as follows: the parties to a dispute before the Court are under the obligation, until the Court has reached a decision on the merits of the case, to refrain from any steps which might have a prejudicial effect on the Court's final decision. This principle is analogous to the corresponding principle of the law of treaties according to which, pending entry into force of a treaty, a State which has signed it, or has expressed its consent to be bound by it, is obliged to refrain from acts which would defeat the object and purpose of the treaty (Article 18 of the Vienna Convention on the Law of Treaties). This principle, in turn, stems from the general idea of good faith. Both principles are indicated by Bin Cheng in his book on *General Principles of Law as Applied by International Courts and Tribunals* (1953) as concerning "circumstances in which States are required by the principle of good faith to maintain the status quo during a period between two events" (p. 140).

The minimal action required to maintain the status quo, in which the provisional measures requested by Finland consist, corresponds well to this general principle.

Such action corresponds also to the duty not to take action which might aggravate or extend the dispute submitted to the Court. The indication *ex officio* of this duty has indeed become a standard clause in orders by the Court indicating provisional measures: suffice it to say that, with slight variations, this clause appears in the operative parts of all such orders adopted by the International Court of Justice.

The view has been held, in particular by the late Professor O'Connell in pleading for Greece in the *Aegean Sea Continental Shelf* case, that the principle that actions should not be taken which aggravate or extend the dispute is a ground for the Court's authority to order interim measures separate from that according to which actions should not be taken which would prejudice the execution of the decision (*I.C.J. Pleadings, Aegean Sea Continental Shelf*, p. 100). Rather than dwell at length on this theoretical question, I would propose to examine the passage of the Order on provisional measures in the case of the case of the *Electricity Company of Sofia*, which was the decision on which Professor O'Connell took his stand. This passage remains the only consideration of this principle in the motives of a decision by the Court. The Permanent Court states that Article 41, paragraph 1, of the Statute:

> "applies the principle universally accepted by international tribunals . . . to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not to allow any step of any kind to be taken which might aggravate or extend the dispute (*P.C.I.J., Series A/B, No. 79*, p. 199).

In this well-known passage of the 1939 Order of the Permanent Court there are two words which seem to have escaped the commentators' attention and which seem to us worth considering. These words are: "in general". The Permanent Court saw the obligation to abstain from steps which might aggravate or extend the dispute as "general" next to the obligation of abstaining from measures capable of prejudicing the execution of the decision to be given. As abstention from the latter measures corresponds to the specific provisional measures which the Court may order, and which are usually requested by the parties, the provisional measure consisting in abstaining from action which might aggravate or extend the dispute would seem to correspond to the widest notion of what is the duty of a party pending the decision of the dispute. In other words, as remarked above, the duty to refrain from any steps which might have a prejudicial effect on the Court's final decision.

This explains, it is humbly submitted, why the Court considers it appropriate to introduce such clause *ex officio* whenever it indicates provisional measures.

Being the most general, the provisional measure contained in this clause is also the minimal one: it requires that the parties do whatever is necessary to avoid prejudice to the final decision but nothing more than that. It is also the one that gives to the parties the highest degree of discretion in its execution.

The provisional measures that Finland requests the Court to indicate, even though they are couched in specific terms, come close to the just indicated characteristics of the Court's standard clause. The request that Denmark should

> "refrain from continuing or otherwise proceeding with such construction works in connection with the planned bridge project over the East Channel of the Great Belt as would impede the passage of ships, including drill ships and oil rigs, to and from Finnish ports and shipyards",

envisages the minimum Denmark could, and should, do in order to avoid prejudice to the outcome of proceedings, and affords Denmark a wide discretion in determining the ways and means to obtain this result that is also characteristic of the Court's standard clause. The request that the Court indicates that Denmark "should refrain from any other action that might prejudice the outcome of the present proceeding" restates the general rule of conduct of parties pending a decision by a court.

It seems hardly necessary at this stage to make the point that the provisional measures requested by Finland are reasonable and in line with the jurisprudence of the Court.

Mr. President, Members of the Court, with your permission, I shall now turn to my third and last main point.

III. The Requested Undertaking by Finland to Pay Compensation

I shall now consider the Danish alternative request put forward in the Written Observations, and supported by the second pleading of Mr. Magid on Tuesday, that the Court should indicate that Finland compensate the losses that Denmark may incur in case the request for provisional measures is granted and the Court later rejects Finland's submissions on the merits.

According to Mr. Magid, liability of the State that obtains from the Court the indication of a provisional measure for the losses caused to the respondent by these measures in the event the Court rejects the applicant's submissions on the merits is dictated by a general principle of law within the meaning of Article 38 *(c)* of the Statute of the Court.

In making this request, and in justifying it by invoking the notion of "general principles of law", Denmark invites the Court to break new ground, to innovate in its jurisprudence, and to do so twice.

Indeed, on the one hand, so far, the Court has never received a request for a provisional measure identical or similar to that put forward by Denmark, nor has it indicated such a measure *ex officio* according to Article 75, paragraph 1, of the Rules of Court.

On the other hand, the Court has hardly ever based a decision on a "general principle of law" within the meaning of Article 38 *(c)* of its Statute. As the late

Professor Michel Virally says in his 1983 General Course at the Hague Academy of International Law, as regards the jurisprudence of the Permanent Court and of the present Court : "le recours aux principes généraux de droit a été exceptionnel et presque toujours implicite" (*RCADI*, Vol. 183 (1983), p. 172).

Judge Lachs in his General Course at the Hague Academy is of the same opinion as he states that : "international courts have very seldom relied on 'principles' evolved in municipal law" (*RCADI*, Vol. 169 (1980), p. 196).

Neither the Statute nor the Rules of Court mention the power of the Court to order the applicant to undertake to compensate the respondent, or to pay a security, in case the judgment on the merits is not in favour of the applicant, or in any other case. It should be added that the proposal made by Judge Nyholm to include in the Rules of Court a provision which would have specifically given to the Court the power to order the payment of a security was not adopted in the Rules of 1922 and never considered again when subsequent revisions of the Rules were adopted.

The possibility for the Court to indicate the obligation to pay compensation, in the event that the claim on the merits by the State that has obtained interim measures fails, is thus mainly a creation of legal doctrine and certainly not one that all writers on the subject have considered. While Dumbauld and Elkin mention it, it is not to be found in the authoritative books by Rosenne and Fitzmaurice, nor in the recent, particularly detailed monograph by Sztucki.

The analogy with domestic law and the notion of "general principles" are mentioned in the literature (see, for instance, Dumbauld, *Interim Measures in International Controversies*, 1932, p. 162). But is this an admissible analogy ? Can the notion of "general principles of law" be utilized for the purpose Denmark would wish the Court to utilize it ?

Within the terms of the Court's Statute, recourse to the "general principles of law" is to be seen, to quote once again, Virally, as :

> "une disposition typique du droit judiciaire, destinée à empêcher le *non liquet*, lorsque le tribunal ne trouve aucune règle de droit, parmi celles qui émanent des sources reconnues, sur la base desquelles trancher de façon raisonnable le différend qui lui est soumis" (*op. cit., loc. cit.*).

It seems hardly thinkable that such could be the case as regards the procedural law of the Court. The Statute and the Rules of Court are a very detailed body of law which, in the case of the Rules, has frequently been revised by the Court. The fate of the proposal of Judge Nyholm I alluded to a few minutes ago seems, if at all necessary, to confirm that, in the Statute and the Rules of Court, there are no *lacunae* to be filled.

Even if we were to follow Denmark in its quest for a general principle of law, it would be necessary to satisfy the requirement that the principle should be present in the main legal systems of the world. Again Virally specifies that the principles qualifying under the terms of Article 38 *(c)* of the Statue of the Court are : "les principes communs à l'ensemble des systèmes juridiques développés" (*op. cit.*, p. 171).

Mr. Magid's brilliant comparative law excursus does not go beyond a group of legal systems of western developed States. Other forms of legal civilization are not taken into consideration. While the practical difficulties of doing so can be easily understood, it is clear that the materials put forward by Denmark are insufficient to meet the test of Article 38 *(c)*.

Furthermore, even the materials from which Denmark claims that the existence of a general principle of law can be inferred show remarkable differences between the various systems. These differences justify questioning whether, even within the relatively narrow group of legal systems considered, there really exists the uniformity of concepts that Denmark claims there is.

It is easy to remark that while some of the legal systems considered provide some means of automatic relief, through the obligation to pay a security to be surrendered to the other party if the plaintiff fails in the main case, or through the principle of strict liability, in other systems, requirements such as fault or diligence emerge.

Even within the Nordic group of legal systems, the Finnish system is not as "identical" to the others as it would appear from the citations made by Mr. Magid. In Finnish law, there is no such thing as general injunctive relief. In this respect, the Finnish legal system contrasts with at least some of the other Nordic systems. The relevant rules are highly idiosyncratic and are collected in the Executions Act of 1895. According to that Act, sequestration or interdiction against sale or dispersion is given by an *administrative official*, not by a court. The discretion is administrative and not judicial in nature. Thus the rule of Section 20, Part 7, of the Executions Act, modified on 18 May 1973/389, quoted by Mr. Magid, is not a rule on compensation but a procedural rule : its purpose is to refer the question of compensation for damage caused by the executionary measure to a regular lower court, which will decide according to the ordinary rules of the Compensations Act, which include the requirement of fault.

One case of 1979 is sometimes quoted to support strict liability, but it was decided before entry into force of the Compensations Act. This is rather far from the strict liability and the injunctions granted by courts of the Danish, Norwegian and Swedish systems.

The indication that Finland should undertake to compensate Denmark's losses arising out of complying with the interim measures in case Finland's case fails on the merits could, perhaps, be based on some argument other than the alleged existence of a general principle of law. The power of the Court to indicate such measure could, perhaps, be argued to be based on an extensive interpretation of Article 75, paragraphs 1 and 2, of the Rules of Court, according to which the Court may "at any time" indicate *ex officio* provisional measures independently from a request of a party, and also indicate measures different from those that have been requested.

Of course, the fact that the Court has never resorted to that interpretation should not be overlooked. But there are also other, more general considerations, that suggest that the indication as a provisional measure of the undertaking to compensate, sought by Denmark, would be neither appropriate nor in conformity with the Statute.

Firstly, the mere possibility of such a measure would add to the already long list of factors that discourage States from resorting to international justice. This very observation further explains why analogies with rules of civil procedure in domestic legal systems are not useful. In domestic law the system of remedies is firmly established and the subjects of law interact on the basis of the full acceptance of the ramifications of this system and of the enforcement power behind it. In international law even the submission of a dispute to a court or tribunal depends on the principle of consent : no such acceptance can consequently be presumed.

Secondly, the provisional measure requested by Denmark would be tantamount to impose on the Applicant the payment of reparation for an act that would not be wrongful.

International law normally reserves the consequence of the payment of reparation to the commission of internationally wrongful acts. It is very difficult to see why this consequence should stem from the exercise of the right of asking the Court to pronounce on the existence of a substantive right and of requesting measures for preserving such right. The only wrongful act that could be envisaged perhaps would be — once again — a frivolous application — that it would constitute an abuse of the process of the Court. As demonstrated when we encountered this recurrent implicit contention before, this cannot be and is not the case in the circumstances of the present dispute.

Thirdly and lastly, such provisional measure would not fall within the terms of Article 41 of the Statute. How can the undertaking by Finland to indemnify Denmark for losses caused by compliance with the interim measures, in case the Finnish case is rejected on the merits, serve to preserve the right to be adjudged on the merits? The undertaking to pay such indemnity has visibly nothing to do with the right of free passage through the Great Belt, be it according to the Danish or the Finnish interpretation.

* * *

Mr. President, Members of the Court, it is almost customary for parties to proceedings for the granting of interim measures of protection to claim that the other party is trying to pre-empt or pre-judge the decision on the merits. Indeed, this is normal advocacy technique, as both sides are, of course, perfectly aware that by definition the jurisdiction to indicate interim measures should be used "to preserve, not to confer rights", as Sir Gerald Fitzmaurice says in his book on the *Law and Procedure of the International Court of Justice* (1986, p. 547) in a section on the "inadmissible objects of the jurisdiction to indicate interim measures".

As the supremely good advocate he is, Professor Bowett has not failed to accuse Finland of the intent of pre-judging the merits. He does so with a special element of sophistication, as he specifies that what Finland tries to pre-judge is the remedy it seeks on the merits. According to Professor Bowett, a whole series of arguments put forward by Finland lead, and I quote from his pleadings last Tuesday, "to the proposition that, when we come to the merits, damages can never be an appropriate remedy".

It is easy to answer that, at the end of its Application, Finland has explicitly reserved "the right to claim compensation for any damage or loss arising from the bridge project". However, the main object of its application is a judgment declaring that there is a right of free passage through the Great Belt for all ships, including offshore craft and reasonably foreseeable ships, entering and leaving Finnish ports and shipyards, with the purpose to be able, on that basis, to start negotiations with Denmark in order to guarantee this right. Consequently, according to Finland, there should be no damage that need to be compensated. The provisional measures Finland is requesting could contribute to that result.

I would be remiss to my duty of advocate if, at this juncture, I were not to retort the accusation of pursuing the intent of pre-judging the decision on the merits. This task is, however, extraordinarily easy. Suffice it to say that if all the contentions put forward by Denmark were accepted by the Court, there would be very little left to decide on the merits. The right which Finland seeks to preserve, and upon which the Court will be called to decide in its judgment on the merits, would be pronounced as non-existent and the Application would, implicitly at least, be branded as an abuse of the process of this Court!

Mr. President, Members of the Court, I would wish to thank you most sincerely for the courtesy, attention and patience with which you have listened to my statement.

The **PRESIDENT**: Mr. Grönberg, I think that concludes the presentation of the case of Finland so that now we may proceed to the questions which some of the Members of the Court wish to ask the Parties. Two Judges will be asking questions. May I call first on Judge Schwebel?

QUESTIONS PUT BY JUDGES SCHWEBEL AND SHAHABUDDEEN

Judge SCHWEBEL :

1. Two questions for Finland. One, in its letter of 29 August 1989 (Annex 5 to the Application), Denmark maintains that drilling platforms, jacks and other high structures can usually be lowered and that this "is often done for safety reasons in the open sea". Does this statement coincide with the Finnish view and if not, why not?

2. In his oral argument, the Co-Agent of Finland referred to :

> "three other categories of ships, namely, drill ships, semi-submersible drill rigs and jack-up rigs, towed or transported by heavy-load transport vessels" (CR 91/10, p. 13).

Is this reference to be understood as meaning that all three types of these vessels are towed or transported by heavy-load transport vessels? If so, but, as has been indicated, one or more types are capable of being fitted out so as to move on its, or their own, power, please furnish details insofar as they have not already been provided.

A question for Denmark. Finland maintains that all of the oil rigs built in Finland could not traverse the Sound since the draught of some of them is more than 8 meters. Denmark deepened the Sound some years ago. Can any further deepening of Drogden Channel be contemplated? And if so, could such deepening be sufficient to permit oil rigs to pass? And if so, are there estimates available of the dimensions of the cost of such dredging? I appreciate that the Agent of Finland referred to such a possibility this morning, and to what may be a somewhat related proposal by the City of Copenhagen, but would benefit by having Denmark's views.

Judge SHAHABUDDEEN : My question, which is in three parts, is addressed to Denmark.

On Tuesday last Mr. Per Magid, for Denmark, told the Court the following :

> "The official comments in the 1987 Act stated that the execution of a high-level bridge should enable Denmark to abide by its obligations under international law to preserve free passage. It was then estimated that the clearance should be 76 to 77 metres. Prior to the Bill the Danish Maritime Authority had noted that drill ships built in Finland and in the Soviet Union had a height above water-level of between 60 and 75 metres." (CR 91/11, p. 25.)

There are three points which I would like to raise :

(i) Who or what body made the estimate that the clearance should be 76 to 77 metres?

(ii) Was the estimate referred to in the official comments in the 1987 Act? If so, is a copy of those comments available?

(iii) Was the estimate influenced by, or intended to accommodate or take account of, the point made by the Danish Maritime Authority that drill ships built in Finland and in the Soviet Union had a height above water-level of between 60 and 75 metres?

The **PRESIDENT**: Those questions will of course be available immediately to the Agents in writing. They may be answered either orally or in writing. If Finland decides to answer orally then the time would be at the beginning of the session tomorrow afternoon and before Denmark begins its final presentation. If Denmark wishes to answer orally it would, of course, answer it wherever it wishes in the course of that oral presentation.

I should perhaps emphasize that some or all of the questions may, nevertheless, be answered in writing if the Parties so wish.

The Court rose at 12.45 p.m.

SIXTH PUBLIC SITTING (5 VII 91, 2.30 p.m.)

Present: [See sitting of 1 VII 91, 10 a.m.]

STATEMENT BY MR. GRÖNBERG

AGENT FOR THE GOVERNMENT OF FINLAND

Mr. GRÖNBERG: Mr. President, Members of the Court, yesterday Judge Schwebel put two questions to Finland and, with your permission, Mr. President, I would like to answer them by starting with question No. 2, as this would give me a possibility to give a brief account of the various types of craft we are talking about.

Question No. 2 reads:

> "In his oral argument, the Co-Agent of Finland referred to three other categories of ships, namely, drill ships, semi-submersible drill rigs and jack-up rigs, towed or transported by heavy-load transport vessels (CR 91/10, p. 13).
>
> Is this reference to be understood as meaning that all three types of these vessels are towed or transported by heavy-load transport vessels? If so, but, as has been indicated, one or more types are capable of being fitted out so as to move on its, or their own, power, please furnish details insofar as they have not already been provided."

As an introduction to the answers, the following illustration of various craft concerned may be shown and that is Picture No. 1[1]. This, of course, is a picture showing the types of craft Rauma-Repola is producing. My intention, after this introductory picture, is to give a more detailed explanation of the various types of craft.

I would then like to move to Picture No. 2. Drill ships are ships equipped with a derrick and other pertinent drilling equipment. They move under their own propulsion like any other ship.

Could I then please get Picture No. 3? Semi-submersible drill rigs are craft with pontoons carrying columns that support the main bit with a derrick. They, again, move by three means. First, they may have thrusters attached under the pontoons, as shown in this picture, with the help of which they are capable of navigating independently. Or, second, they may be towed; towage is usually undertaken as a means to speed up the passage. Or, third, they may be carried by heavy-lift vessels; this is done usually in case of long transports.

I would then like to move to Picture No. 5, which shows a jack-up being transported by a heavy-lift vessel. A "jack-up" is a drilling craft with a derrick and other drilling equipment on the deck, supported by legs which are lowered on the sea bottom on the drilling location. Jack-ups are built lightweight and heavyweight, depending on the operational conditions. Jack-up rigs are transported by two means: they are often carried by heavylift transport vessels, as the picture shows; or they can be towed, especially when moved short distances from one drilling location to another.

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[1] Pictures not reproduced.

After this, Mr. President, I would then like to move to question 1. The question is whether the Finnish view coincides with the statement contained in the Danish letter of 29 August 1989 that "drilling platforms, jacks and other high structures can usually be lowered" and that this "is often done for safety reasons in the open sea".

The answer simply is that the Finnish view coincides only to a very limited extent with that statement, for the following reasons. The question seems to require an answer as to whether the lowering of the structures under consideration can be done, and an answer as to whether it is often done for safety reasons in the open sea.

We have, in fact, a chart, Picture No. 6, which shows all the alternatives and answers. Those, of course, are based on that information which was made available to us.

But I would like to revert to the question. As regards the first aspect of the question, Finland has stated that the technical possibility exists in yard conditions. I refer here to the intervention by Dr. Koskenniemi, on 1 July 1991, and to my own intervention yesterday. I indicated also why it would be very costly and time-consuming — and here I specially refer to Annex IV in my intervention from yesterday. It must be underlined that the industry standards set requirements on strength and structures as well as on electrical, hydraulic and mechanical systems, which makes this assembly difficult because of the high complexity of the systems concerned and this is the reason why this assembly becomes so expensive.

Coming to the second aspect of the question, the information available to Finland is that such lowering operations are not often done for safety reasons in the open sea. As a matter of fact, Finland has no positive information about any such operation having been performed. In fact, as regards heavyweight craft — and here I would like to underline that all the drill ships, semi-submersibles and jack-up rigs produced in Finland are categorized as heavyweight craft — safety reasons would suggest such operations do not exist, as these craft are stable and built to operate in the heaviest weather conditions. If the lowering operations were to be done for some specific reasons in the open sea, it would be extremely difficult and expensive. To illustrate this, it is sufficient to indicate that special floating cranes would be necessary, which would have to be transferred to the site where the operation would take place. Environmental conditions will certainly also set limitations to the timing of operations like this.

Even though Finland does not have precise information about lightweight jack-up rigs, it cannot be excluded that, at least in exceptional circumstances, they may have undergone lowering operations in the open sea for safety reasons.

Mr. President, Members of the Court, this being the last intervention by Finland during these oral hearings, I would like to express our thanks to you, Mr. President, and to the Members of the Court for your attention. Thank you.

STATEMENT BY MR. LEHMANN

AGENT FOR THE GOVERNMENT OF DENMARK

Mr. LEHMANN: Mr. President, distinguished Members of the Court. Today, the Danish team will reply to the Finnish arguments and contentions made on Monday and yesterday. We will start by rebutting Finland's presentation of the facts. This will be done by my colleague and Co-Agent, Attorney Per Magid. In the course of that presentation we will also answer the questions put to Denmark by Judge Schwebel and Judge Shahabuddeen. But first, Professor Gimsing will deal with the modifications to the bridge project proposed by Ambassador Grönberg in his address to the Court yesterday morning.

After this presentation of the factual elements, counsel for the Danish Government, Professor Bowett, will deal with the essential conditions for granting a request for an indication of provisional measures.

Finally, I will present some remarks concerning the alleged Finnish right to be protected, and comment upon the actual terms of the Finnish request for the indication of provisional measures in the present case. I will then conclude our presentation and state our final submissions.

* * *

Before leaving the floor to Professor Gimsing, allow me, Mr. President to place this case in its true perspective. Yesterday, Ambassador Grönberg tried to present Finland as a State championing the right of free, unimpeded navigation through international straits. It was almost as though Finland appeared before the Court to represent the interests of all the Baltic States. The specific interest of the Finnish company, Rauma-Repola, was simply incidental to this major course.

Mr. President, it is necessary for the Court to keep some essential facts in mind. No other maritime nation, whether within or outside the Baltic, has protested to Denmark about the bridge project across the Great Belt. No shipping of any kind will be impeded by the new bridge. The yearly movements of some 20,000 merchant ships passing through the Great Belt will not be affected in any way by the construction of the high-level bridge. Existing and normal traffic will continue as before.

The only movements that will be affected are not shipping movements, but the passage of these few offshore drilling units built by Rauma-Repola. Even these units will have difficulty only because Finland refuses to contemplate towing them through the Sound, which is not an intrinsically dangerous operation, or having them pass under the new bridge in sections. The passage of these units may take place only every second year, and perhaps not even then if the Finnish shipyard diversifies into other forms of construction. That is what the case is all about: some very few Finnish oil rigs foreseeing certain difficulties in passing through the Danish Straits after the bridge over the Eastern Channel of the Great Belt has been installed, towards the end of 1994, i.e., more than three years from now. Because of that future difficulty on the part of the Rauma-Repola company, Denmark, as a nation, is asked to change or to stop further construction of its bridge project, which is already far advanced and is part of an integrated project linking the two main parts of our country together.

This is by way of introduction, Mr. President. I would now like to leave the floor to Professor Gimsing to answer some of the proposals made yesterday.

REJOINDER OF MR. GIMSING

COUNSEL FOR THE GOVERNMENT OF DENMARK

Mr. GIMSING : Mr. President, distinguished Members of the Court.

Comments on the Proposed Modifications to the Bridge Project Presented by Finland

In the hearings on 4 July, Ambassador Grönberg proposed a number of technical solutions to the problem of modifying the Great Belt Link, so as to allow the passage of large Finnish Mobile Offshore Drilling Units (MODUs).

Apparently, the aim of presenting a range of technical solutions, accompanied by cost estimates, is to give the Court the impression that modifications can be made in many ways and at marginal costs. I will briefly take the Court through these alternative solutions, one by one.

In my view, as someone who has more than three decades of experience with the design of major bridges, I would say that none of these solutions are technically feasible and, I say this on the basis of an intimate knowledge of this particular project. I have spent the last 20 years of my life closely associated with the technical planning of this project.

I shall start by drawing the Court's attention to the verbatim record from yesterday (CR 91/13, p. 28), describing under item 1 the first solution, involving a replacement of two spans with a pontoon bridge in the West Bridge.

A pontoon bridge will necessarily have to displace its pontoons downwards to increase its uplift, to compensate for the load of a passing train. This movement will involve a dynamic behaviour and flexibility that is far beyond the specified limits for high-speed train lines. It will simply be dangerous. Anybody who has experienced the movements that occur when a train is slowly rolling onto a ferryboat will easily understand that a floating support cannot be applied under a railway bridge. In addition, the bridge must be able to withstand high ice pressures during severe winters and be robust enough to withstand ship collisions. So, it becomes evident that the pontoon solution is technically inadequate. Such a bridge will not be sufficiently stable.

To my knowledge, we cannot anywhere find an example of a major railway bridge supported by pontoons.

Under item 2 is mentioned a second solution that, apparently, involves the idea that the original concrete spans of the West Bridge should be moved aside by pontoons and then moved back into position. I know the very elaborate process of erecting the precast girder elements that, in the construction phase, are separated by 1 meter-wide gaps in the West Bridge by a specially designed heavy-lift crane and, from this, it must be concluded that this solution is unrealistic. The positioning of these girders is so difficult that it is impossible to believe they could be moved into and out of position on a pontoon. This is, however, also reflected in the Finnish description stating that, "the opening is expensive and time-consuming".

The third solution seems to indicate a swing bridge, based on rotating the concrete girders, but that would only give an opening of 75 metres width, at the maximum, and it would, according to the Finnish description, involve problems related to the expansion joints that would be problematic. So, the opening would be insufficient and the re-instatement of the girders would be difficult to guarantee.

The fourth solution describes a solution that requires a complete redesign of the entire East Bridge and is characterized by being "technically demanding and untested". I fully agree with this Finnish characterization.

As regards the solutions with movable spans, including the solution indicated in the verbatim record (CR 91/13, p. 11), it must be pointed out that these solutions, generally, will require a construction of an unprecedented magnitude, as no bridges of this actual type have ever been built with the necessary span widths. This implies that the construction would be a prototype, as yet untested, inevitably involving unit costs far beyond those for present movable bridges.

Even if movable spans of the required size were technically feasible, it would certainly affect the overall safety of the entire project if a second navigation opening had to be added outside the large navigation span of the suspension bridge.

The very thorough investigations into navigational safety, carried out by manœuvring simulations and based on observations of actual ship movements around bridges, have clearly indicated that the most important parameter in achieving a high degree of safety is the distance from the passing ships to the fixed objects of the bridge, i.e., the bridge piers.

With the chosen main span of 1,624 metres it is assured that the distance from a correctly manœuvred ship to the nearest bridge pier will be 400-500 metres and this will give a comfortably large margin for accommodating deviations in the course of the ship caused by unexpected current and wind actions or by human errors. In this context it must be remembered that the passage under the bridge will take place in the open sea where the manœuvring necessarily must be less accurate than in more sheltered waters.

If a movable span were to be introduced it would in any case have to be made with the smallest possible span due to the progression of the technical difficulties associated with any increase of the span. The longer the span, the greater the technical difficulties.

This means that, with a movable span, the passage of large Mobile Offshore Drilling Units would have to take place at a distance from essential structural parts of the bridge that is only one-tenth or less of the distance provided in the main span. Therefore, an additional risk will be introduced, hampering the whole effort to achieve a high degree of navigational safety, by the choice of the very large suspension bridge span.

The introduction of a movable span to allow the passage of very large floating objects that are difficult to manœuvre would, therefore, be in contradiction to one of the most important design considerations regarding a very low probability of disruption of the fixed link. By disruption I refer to the risk of collisions that would lead to a partial collapse of the bridge structure.

To complete the theme of technical aspects it might be relevant also to add a few general comments on the possibilities of modifying the Finnish Mobile Offshore Drilling Units so as to allow a passage under a bridge with a clearance of 65 metres. Remarkably, Finland offers no suggestions for modifying these units.

First of all, it should be mentioned that it is much more the rule than the exception that large structures are fabricated in a number of transport units that are finally assembled on site. Thus, a bridge is not built in full size ashore and floated into place in one piece, neither is a building prefabricated in one piece at the precasting yard, a TV tower is not transported in full length or an exhibition hall completed at the steel fabricators. So the structural engineers are trained to design the structures with erection joints that can be efficiently closed at the site and if designed skilfully from the beginning, the economic consequences of the required separation and re-assembly are insignificant.

In the case of the large Finnish Mobile Offshore Drilling Units it should also be mentioned that transport without the highest parts of the structure in position might even give general advantages as the whole floating structure will become more stable when the centre of gravity is lowered.

And with these remarks on technical possibilities of modifying the floating structures, I shall with your permission, Mr. President, now leave the floor and pass the word on to Mr. Per Magid.

REJOINDER OF MR. MAGID

AGENT FOR THE GOVERNMENT OF DENMARK

Mr. MAGID: Thank you, Mr. President. Members of the Court, today I am entrusted with the task of answering the questions put to Denmark by Judge Schwebel and Judge Shahabuddeen. Further, I will comment upon the factual issues raised by Finland during these proceedings.

My address will basically — to paraphrase Dr. Jiménez de Aréchaga — be uncorrupted by law, except for a few comments at the end in reply to what has been said by Finland's counsel on Denmark's alternative submission.

I. The Finnish Mobile Offshore Drilling Units and the Possibility for Passage through the Sound

On Tuesday, Ambassador Per Fergo addressed the technical specifications of the Mobile Offshore Drilling Units produced by Rauma-Repola Offshore and the possibilities for transporting these units through the Danish straits, both before and after the completion of the East Bridge. Referring to the observations on this topic made by Finland's Agent, Dr. Koskenniemi, during his intervention on Monday, Ambassador Fergo reserved the right to respond more fully to Finland's presentation of this important factual aspect of the case.

And with your permission, Mr. President, I will do so now. A response is necessary because there are misunderstandings and inaccuracies in Finland's presentation of the relevant facts.

In this part of my intervention I will clarify why only the Finnish Mobile Offshore Drilling Units are relevant to the present proceedings and briefly re-examine possibilities for passage through the Sound of each of the three relevant types of Finnish offshore units.

First, it would seem expedient to make it absolutely clear what types of vessels and offshore units are relevant to the present proceedings. In his address to the Court on Monday on Finland's dependence on the Great Belt, Dr. Koskenniemi made several references to various non-offshore vessels, such as very large luxury cruise-liners, heavy-load transport vessels, crude oil tankers, ice-breakers and ferries produced in Finland (CR 91/10, pp. 13 and 23).

The many references to these vessels and to the plight of the Finnish shipbuilding industry in general should not obscure the fact that none of these vessels, currently produced in Finland or elsewhere, will have any problems passing under the East Bridge. Apart from the Mobile Offshore Drilling Units which I will turn to in a moment, Finland has never produced a vessel that reached a height of 65 metres or more.

Dr. Koskenniemi contended that the Great Belt Project will affect the capacity of the Finnish shipyards to submit tenders for very large special ships (CR 91/10, pp. 23 and 28). First of all, this claim is unsubstantiated. Finland has not demonstrated that there will be any demand for such future ships. Secondly, such future ships, whether foreseeable or not, are not covered by Finland's request for provisional measures.

Finland has not sought protection in the form of provisional measures to safeguard the passage through the Great Belt of any of these non-offshore vessels, be they present or future craft.

In the words of Sir Ian Sinclair on Monday "the request is confined to drill ships and oil rigs" (CR 91/9, p. 44). With all respect, in my opinion this renders large portions of Dr. Koskenniemi's address on the Finnish shipbuilding industry and cargo transport through the Great Belt irrelevant (CR 91/10, pp. 10, 13, 23 and 28).

What is of interest then, is exclusively the drill ships, jack-ups and semi-submersibles of the types hitherto produced by Rauma-Repola Offshore.

It has been argued by Denmark that the continued passage of the Finnish Mobile Offshore Drilling Units through the Danish Straits poses much less of a problem than maintained by Finland.

One would think the Parties could agree that at least until the actual erection of the suspension part of the bridge above the navigation channel, there would be no impediment to continued passage through the Great Belt. But in his address to the Court on Monday, Sir Ian Sinclair suggested "the asserted right of free passage may also be adversely affected during the construction works themselves" (CR 91/9, p. 64).

This suggestion is rejected. Keeping the Great Belt completely open to navigation also during the construction period has been a principal concern of the Danish Government.

Careful measures to that effect have therefore been taken by Denmark, and during its 36th Session in September 1990 the Sub-Committee on Safety of Navigation of the International Maritime Organization endorsed the action taken by Denmark to ensure the safety of navigation during the construction period. Thus, as it has been pointed out earlier, the passage of Finnish offshore units will in no way be affected by the construction works for the East Bridge until the end of 1994.

After 1994 the Finnish offshore units must either be slightly modified to be able to pass under the East Bridge or be navigated through the Sound. This issue was examined by Ambassador Per Fergo on Tuesday. I will reopen this important factual issue only to the extent necessary to counter or rectify the information given by Finland.

I will begin by re-examining the possibilities of passage through the Sound.

First let me clear up some misunderstandings on the Finnish side.

The deepest navigational route through the Sound is the Drogden Channel with its minimum charted depth of 7.7 metres. On Monday, Dr. Koskenniemi, speaking of the Sound, made reference to a resolution of the International Maritime Organization (No. A.620 (15), 1987) recommending ships going to the Baltic to take into account that the charted depth "may be decreased by as much as 2 metres owing to unknown and moving obstructions" (CR 91/10, p. 15).

The IMO declaration clearly does not refer to the Sound. It refers exclusively to the "T" Route, which passes through the Great Belt. In contrast to the Great Belt, the Drogden Channel is a dredged channel, regularly maintained, where such unknown and moving obstructions do not occur. The depth of 7.7 metres is consequently not merely nominal, as suggested by Finland's Agent, but genuine and reliable.

Dr. Koskenniemi further stated that the water level of the Sound might change due to strong winds by as much as 2 metres. This is somewhat exaggerated. Under extreme wind conditions, when transport of offshore oil rigs would not normally be carried out, the water level in the Sound may vary by up to 1 metre. Such unusual conditions occur only once every fifth year and may ordinarily be predicted 48 hours in advance.

As has become evident, Denmark and Finland are not in agreement as to the possibilities for transporting Mobile Offshore Drilling Units through the Sound. There are two distinct questions. One is the feasibility of taking through the Sound units or vessels with a draught close to the official water depth of 7.7 metres. Finland argues that the official depth of 7.7 metres is too shallow and that transporting units with a draught of 7.3 or 7.5 metres would be extremely hazardous (CR 91/10 p. 15).

In this connection, I would like to draw the Court's attention to another Resolution from the International Maritime Organization — No. A.579(14) — recommending *inter alia* that loaded oil tankers with a draught of 7 metres or more use the pilot service established by the Danish and Swedish Governments for passage through the Sound.

This demonstrates that it is by no means uncommon that vessels with a draught of more than 7 metres navigate by pilot through the Sound. In fact, the Danish Pilot Authority has stated that Danish pilots regularly take ships with a draught of up to 7.7 metres through the Drogden Channel.

The second question in dispute is the feasibility of towing, to avoid the use of heavy-lift vessels with a draught so deep as to make the use of the Sound impossible. This refers only to jack-ups, as Finland has stated that all semi-submersibles have been towed through the Danish straits. Finland has suggested that towing of jack-ups is unsafe. But this is really true only of towing these large units in the open sea. Obviously, in terms of an ocean crossing, the risks of heavy seas and high winds are considerable. But the Danish Sound is a relatively sheltered area, and certainly, with pilots and sensible choice of weather conditions, towing should present no real problems.

Denmark agrees with Finland that towing the Finnish offshore units through the Sound is in most ways more inconvenient than going through the Great Belt. Transport through the Drogden Channel with a draught near the official depth will require planning, use of pilot, and an absence of unfavourable conditions. This is not unusual for offshore transport, however. But, obviously, inconvenience does not amount to impossibility.

In his address to the Court yesterday Ambassador Grönberg bypassed the Danish interventions on Tuesday on the possiblities for passage through the Sound, merely referring to Dr. Koskenniemi's statement on Monday.

Let me very briefly reiterate the position with respect to the 3 types of offshore units produced by Rauma-Repola. I will refer to the information submitted by Dr. Koskenniemi on Monday and the list of Rauma-Repola's productions shown to the Court yesterday by Ambassador Grönberg as picture 1.

The 3 drill ships produced by Rauma-Repola (RR 15, RR 16 and RR 17 in Annex 15) all have a draught of 7.3 metres as acknowledged in the Finnish Application. Has Finland demonstrated that these ships and others of the same kind are not able to sail through the Sound? It has not. The Court will note from the aforementioned Picture No.1 that Finland has no record of how these ships passed the Danish straits. Danish authorities have on record that at least one of these drill ships has passed through the Sound.

According to Picture No. 1, the 2 jack-ups produced and delivered by Rauma-Repola (RR 22 and RR 23) were transported through the Great Belt on heavy-lift ships with a combined draught of much more than 7.7 metres. But, as follows from Annex 15 to our written observations, both of these jack-ups have a floating draught of 6.4 metres. This figure has not been disputed by Finland. Has Finland demonstrated that these jack-ups could not instead have been towed through the Sound? It has not.

In case of adverse weather conditions, the depth of the Danish waters will always allow the jack-up to lower its legs in order to stand firmly and securely on the the seabed until the weather has cleared. After passage of the Sound and before reaching the open sea, the jack-up may then be transferred to a heavy-lift ship if preferred.

In my opinion, Finland has thus been unable to point to any circumstances compelling Rauma-Repola to transport their jack-ups by heavy-lift ships. Let me end by stressing that towing is by far the most common way of transporting jack-ups.

Finally, there are the 16 semi-submersibles produced by Rauma-Repola. In his address to the Court on Monday, Dr. Koskenniemi stated that 4 of these semi-submersibles have been equipped with so-called thrusters, a sort of propeller which adds 3.9 metres to their draught. This induced Dr. Koskenniemi to conclude that for these units " passage any other way . . . would have been impossible" (CR 91/10, p. 14).

Denmark disagrees and I will try to substantiate our differing position. My first comment is that one of these units (RR 18) is a multi-purpose support vessel. This unit does not have a drilling tower and is only 66 metres high, see Picture No. 1. During passage, the air-draught or height of this vessel could be decreased by 2 metres by ballasting and it would thus easily sail under the East Bridge.

As for the others, I note that thrusters are by their very nature readily dismountable; when the rig is produced the thrusters must necessarily be mounted at sea and they must be dismounted before the rig can be taken into another dock.

With the thrusters dismounted these semi-submersibles may be towed through the Sound. This was already recognized in the report from Det Norske Veritas (Ann. 10), item 5.2. The subsequent mounting of the thrusters is a relatively simple operation that may often be carried out by the rig personnel at sea without the assistance of a shipyard. Thus there is no foundation for the Finnish claim for impossibility as regards passage through the Sound for these units with dismountable thrusters.

According to Finland's Picture No. 1, all of the remaining 12 semi-submersibles have transit draughts below the official depth of the Drogden Channel. It should be borne in mind that the quoted transit draught of a semi-submersible may be reduced even further by using less than full ballast during the transit of the Drogden Channel or by reducing the load carried on the rig.

Denmark maintains its contention that most of these units will be able to be towed through the Sound with the aid of Danish pilots.

The Court will note from Picture No. 1 that all of the Finnish semi-submersibles have been towed through the Danish straits and that one of them (RR 6) has been towed through the Sound. It can hardly be contended that anything would have prevented the six other semi-submersibles with identical transit draughts from using the same route.

Let me end this clarification of the issue of passage through the Sound by referring to a statement made by Dr. Koskenniemi on Monday. Finland's Agent informed us that one of the Rauma-Repola's offshore units had not been transported through the Danish straits, but had been delivered in the Caspian Sea through another route (CR 91/10, p. 15), presumably through the Soviet Union.

Being of course unaware of the details of this report, I can only speculate. But it would seem more difficult to navigate a Mobile Offshore Drilling Unit down the rivers of the Soviet Union than through the Sound or under the future East Bridge.

Admittedly, there may be a few semi-submersibles that might not be able to pass through the Sound but will have to pass under the East Bridge. For these few units, only the top of the drilling tower will have to be left unassembled until the passage of the bridge. The limited character of this operation has been ignored by Finland in the calculation of the costs and time required for completing the assembly. The reason for this was made clear to us only yesterday when Ambassador Grönberg revealed the basis for the Finnish calculations by submitting Picture No. 3.

The Finnish calculations assume that not only the top, but, inexplicably, the entire derrick is disassembled; the calculations also assume that the entire drilling area equipment and systems are dismantled and reassembled, a most complicated and time-consuming — and more to the point, utterly unnecessary — operation. Denmark maintains that it is only necessary to leave the top of the derrick unassembled.

Finland's calculation of the required costs and erection time reflected in Pictures Nos. 3 and 4 submitted to the Court, as has been consistently argued by Denmark, is a manifestly inflated calculation as it in no way reflects the minimal modifications actually necessary to enable passage under the bridge.

As will have become apparent, the Danish Government is of the opinion that it does not require much flexibility on the part of Rauma-Repola to make the necessary modifications of their transportation or production routines to secure the continued passage of their offshore units through the Danish straits.

2. COMMENTS ON FINLAND'S SUGGESTION THAT RAUMA-REPOLA IS ALREADY SUFFERING DAMAGES

And now, I will turn to my second topic and address the contention by Finland that the sheer notion of a planned bridge across the Great Belt is already causing hardship to Rauma-Repola.

On Monday, Sir Ian Sinclair noted that Rauma-Repola was already experiencing a falling-off of orders for offshore units, which he considered "partially attributable to the fact that potential customers are now aware that passage through the Great Belt will become physically impossible for drill ships and oil rigs" (CR 91/9, p. 63).

With all respect, this is mere speculation. The falling-off of orders is a development that must have started already in 1985, the year when Rauma-Repola delivered its last offshore unit produced in the yard at Pori. For six years the yard has not been able to secure a production order. Can this be caused, in whole or in part, by the prospects of a bridge across the Great Belt? Is it not far more likely that the absence of orders may be ascribed exclusively to the high production cost in Finland and the general recession on the oil market as was recognized in the 1990 Annual Report from Rauma-Repola, referred to by Ambassador Fergo on Tuesday?

I conclude with confidence that Finland will not suffer substantial losses if Denmark commences or even completes the construction of the East Bridge. With the possibility for passage through the Sound and the minor modifications necessary to allow for passage under the East Bridge, the inconvenience and cost increases imposed upon Finland are minimal. More to the point for purposes of these proceedings on provisional measures, the damage that may be sustained by Finland cannot be characterized as irreparable; the damage is, on the contrary, eminently capable of compensation by monetary damages.

3. Finland's Interpretation of the Position of the Soviet Union to the Great Belt Project

In his address to the Court yesterday, Ambassador Grönberg explained at some length how Finland perceived the position of the Soviet Union to the Great Belt Project. It was surprising to hear from the Agent of Finland that the Soviet Union has made "a challenge to . . . [the] very legality" of the Great Belt Project. I submit that no such challenge has ever been made by the Soviet Union — to Denmark or to any international body.

What is the factual basis for bringing the Soviet Union into this case between Finland and Denmark?

Let us first have a look at the reaction of the Soviet Union to the 1977 notification. In the Note of 29 March 1978 the Soviet Union set forth three specific requests:

1. that the depth of the water in the Belt's channels should not be changed to a shallower depth as compared with the existing depth;
2. that the clearance of the bridge should be of a minimum of 65 metres, and finally,
3. that the free horizontal clearance in the channel between the bridge piers should be at least 350 metres.

The remaining part of the Note does not, as alleged by Ambassador Grönberg, "lay down several grave reservations against" the bridge plan. The Note simply continues by explaining the reasons for the specific requests. The Note also raises the question of navigational safety and asks for additional technical data concerning the bridge project.

The Great Belt Project meets the three specific requests put forward by the Soviet Union in its Note of 29 March 1978. Consequently, it was not surprising to Denmark that the Soviet Union did not respond to the 1987 and to the 1989 notifications. Since the Note of 29 March 1978 — more than 13 years ago — the Danish Ministry of Foreign Affairs has not received any further notifications from the Soviet Union concerning the Great Belt Project.

The issues of navigational safety in connection with the bridge project raised in the Soviet Union's Note from 1978 have been dealt with by the International Maritime Organization.

Within this Organization, Finland has never expressed any reservations concerning the Great Belt Project.

It is correct that the Soviet Union at the meeting of the Council of the International Maritime Organization held in June 1991 expressed its concern over the planned bridge. This was done in connection with the discussions of a report from the Maritime Safety Committee.

The concern expressed by the Soviet Union could hardly be characterized as a challenge to the legality of the Great Belt Project. If it had been, the Danish Ministry of Foreign Affairs would certainly have been approached by the Soviet Union.

4. Answer to the Question Posed by Judge Schwebel on the Possibilities for Further Deepening of the Sound

Yesterday, Judge Schwebel asked Denmark the following questions:

1. "Can any further deepening of the Drogden Channel be contemplated?"
2. "If so, could such deepening be sufficient to permit oil rigs to pass?"

3. "If so, are there [any] estimates available of the dimensions of the cost of such dredging?"

I will, with your permission, answer the questions in one answer. The Drogden Channel was deepened in 1923 from 7 to 7.7 metres. The Channel has a length of 6 nautical miles and a width of 290 metres.

The possibility of a deepening of the Drogden Channel was foreseen in connection with the agreement between the Governments of Denmark and Sweden reached in March 1991 on the establishment of a fixed link across the Sound referred to in paragraph 46 of our Written Observations. If that project is realized, the immersed tunnel between Zealand and Saltholm will be situated across a part of the Drogden Channel that has a depth of more than 10 metres. This will be done to ensure that the possibility for deepening the Drogden Channel at a later date from 7.7 to 10 metres is retained.

There are no actual official plans for a deepening of the Drogden Channel and detailed analysis of such an operation has not been made.

A deepening from 7.7 to 10 metres will necessitate the excavation of around 8 million cubic metres of material from the bottom of the sea.

The impact on the marine environment of such immense dredging works have not been thoroughly examined. Until that is done, it is not possible to give an opinion on whether said deepening would be feasible. The flow of water through the Sound would be altered by a deepening, which could result in unacceptable effects on the oxygen and salinity balances of the Baltic Sea.

Preliminary cost estimates indicate that the cost of deepening of the Drogden Channel to 10 metres will be between DKK 800 and 1,200 (approximately equalling US$120 million and 180 million).

Denmark and Finland differ on what water depth is required to allow for passage of the Finnish oil rigs and drill ships. As stated earlier, Denmark is of the opinion that already with the existing depth of the Sound and without further dredging most of the Finnish units can pass through this strait.

Finland has asserted and I refer to the Application, paragraph 17, that the Finnish oil rigs have transit draughts of up to 15 metres, in which case any practically conceivable deepening of the Drogden Channel would be insufficient.

5. ANSWER TO THE QUESTION POSED BY JUDGE SHAHABUDDEEN REGARDING THE OFFICIAL COMMENTS TO THE 1987 ACT AND THE PROJECTED CLEARANCE HEIGHT OF 76-77 METRES

"(i) Who or what body made the estimate that the clearance should be 76 to 77 metres?

(ii) Was the estimate referred to in the official comments in the 1987 Act? If so, is a copy of those comments available?

(iii) Was the estimate influenced by, or intended to accommodate or take account of, the point made by the Danish Maritime Authority that drill ships built in Finland and in the Soviet Union had a height above water level of between 60 and 75 metres?"

With your permission I will also answer this in one answer and before answering this question, I would like to make clear that the official comments to Danish Acts are written by the Ministry responsible for the drafting and the submission of the Bill to the Parliament. The Bill to the 1987 Act was submitted to Parliament on 21 January 1987 by the Minister for Public Works. The official comments to the Bill were prepared by the Ministry of Public Works on consultation with other Ministries and Government agencies.

Article 4, Section 2, paragraph 1, of the Act provides in pertinent part: "The Motorway link may cross the Eastern Channel on a high-level bridge with the required navigational clearance . . .".

The comments to the corresponding provision in the Bill read as follows:

> "By the provision that the high-level bridge is to be constructed with the required navigation clearance it is made clear by the legislature that Denmark adheres to its obligations under international law to preserve the free passage of ships. A high-level bridge shall probably have a navigational clearance of 76-77 metres."

I have provided the Court with copies of the official comments and the relevant passages translated into English.

In the official comments to the Act, the estimates of a navigational clearance of possibly 76-77 metres was thus made by the Ministry of Public Works. The Ministry based its estimate upon information from the Ministry of Industry and the Danish Maritime Authority, which had in 1986 noted that drill ships produced in the Soviet Union and Finland had a height above water level ranging between 60 and 75 metres and that a bridge clearance of 76 metres was therefore called for.

Before a final decision on the clearance height of the East Bridge was taken, the classification agency Det Norske Veritas was commissioned to make a report on the air-draught of large ships and offshore units. In item 4.2 of the report, which is Annex X to Denmark's Written Observations, Det Norske Veritas established that drill ships in general had draughts that would allow them to sail through the Sound.

Specifically referring to the Veritas report and the fact that drill ships were able to pass through the Sound, the Danish Maritime Authority in 1989 endorsed a bridge clearance of 65 metres.

6. THE COMMENTS MADE BY FINLAND'S COUNSEL ON DENMARK'S ALTERNATIVE SUBMISSION

Mr. President, Members of the Court, I will now turn to the comments made by Sir Ian Sinclair and Professor Treves on Denmark's alternative submission.

In his first intervention (CR 91/10, p. 67) Sir Ian Sinclair stated that Finland could not believe that Denmark's alternative submission is meant to be taken seriously. The alternative submission was described as "ill-conceived".

In any litigation each party has the right to decide to what extent he will take seriously what has been advanced by the other side. This also comprises submissions. Consequently, Finland has the right to choose not to take the alternative submission of Denmark seriously.

But if Finland were to make that choice in the belief that the Danish submission has no basis in law, that might be very unwise.

Shortly after Sir Ian Sinclair's address, Dr. Koskenniemi explained to the Court (CR 91/10, pp. 19-20) that if the present issue before the Court was a matter of national law before a national court "we would be facing a very typical cause for an interlocutory injunction". Dr. Koskenniemi illustrated this with an example describing a dispute between a person A and his neighbour B on a construction work preventing lorries from using the common road that leads into B's real estate. He found that there would be few jurisdictions deying B the right to stop the construction by an interlocutory injunction. Dr. Koskenniemi finally submitted to the Court "that for the reasons for which we would immediately recognize the situation calling for the order of provisional measures are equally present in international as well as national law".

But how can it be that Finland draws on analogies from national law when it comes to describe situations in which injunctions can be imposed but refuses to take seriously Denmark's submission that the widely accepted principle in national law on liability for damages caused by an unjustified injunction are equally applicable in international law as a general principle of law?

I submit, Mr. President, that the potential risk for causing unjustified damages by an injunction necessitates a potential liability for the party requesting the injunction.

Sir Ian Sinclair pointed out that no request similar to the alternative Danish submission has been presented before the Court. But does this imply that the alternative Danish submission should not be taken seriously? I believe that the Court is entitled to listen to arguments based on general principles which have not been made in earlier cases and to accept such arguments if they are merited.

Finally, I submit, that an acceptance of a potential liability for a party requesting provisional measures will not as suggested by Sir Ian Sinclair cause an unacceptable increase in the risks inherent in instituting proceedings before this Court.

On the contrary, to accept that this well-established principle in national law also applies in international law will encourage moderation. A State will then know that provisional measures are not a remedy which can be used with its inherent potential for inflicting damages upon other States with no possible risk to oneself.

I must confess to some surprise at the rather cavalier fashion in which Professor Treves dismissed Denmark's reliance on general principles of law. As he well knows, Article 38 *(c)* of the Court's Statute provides for general principles of law as a principal — not a subsidiary — source of international law. And while it is true that international courts and tribunals have rarely found it necessary to make such general principles the sole basis for their decisions, because of the wealth of treaty and customary law, the reliance on general principles should not be understated. One need only recall the *Corfu Channel* case or the Court's use of estoppel in the *Temple of Preah Vihear* case, or the reference to equity in the maritime boundary cases to see how important this source is. And there are many other examples of which the Court is better aware than I am.

His real objection seems to be that the Danish submission is a novel one. But if it has a sound legal basis in general principles, and accords with justice of the situation, why should novelty be an objection?

And the objection that such a power is not vested with the Court, because it is not *expressly* provided for in the Statute or Rules is surely bad. The Court has, under its Statute, complete discretion to adopt those remedies which are appropriate to the case before it and in accordance with law.

Mr. President, Members of the Court, I thank you for your attention, patience and courtesy. And with your permission, Mr. President, I will now leave the floor to Professor Bowett.

REJOINDER OF MR. BOWETT

COUNSEL FOR THE GOVERNMENT OF DENMARK

Mr. BOWETT : Mr. President, Members of the Court, I think there are only three points on which I can be of further assistance to the Court, and I can be brief. These three points are the element of urgency, the need for proportionality and, lastly, the relationship between the need for Finland to prove its anticipated injuries are irreparable and the remedy it seeks. I shall start with the matter of urgency.

1. THE QUESTION OF URGENCY

We remain without any adequate explanation for Finland's apathy, for its extreme tardiness in warning Denmark that the Great Belt Project constituted a threat to Finnish rights. The plain fact is that Finland did nothing at a stage when common prudence dictated that a formal approach should have been made to the Danish Government.

Dr. Koskenniemi said, quite properly, on Monday that :

> "In a sense, the very decision to opt for a bridge solution in the East Channel — instead of the tunnel alternative, which existed still in 1987 and is still provided in the relevant Danish law — already created a threat." (CR 91/10, p. 33.)

Now that is right. But why then did Finland not react in 1987 ? There is throughout the oral arguments of Finland the suggestion that a tunnel was an equally-likely solution, so that Finland had no need to protest until that solution was rejected and a final decision made in favour of a bridge. But this is simply not consistent with the facts. The facts are that the Report of the Governmental Commission in 1960 envisaged a bridge, and no tunnel. So did the 1973 Act.

It is certainly true that the 1987 Act left both options open, but in very different terms. The Act clearly stated that the tunnel scheme should be pursued only if, for technological and economic reasons, this seemed preferable. And the official comments to the Bill openly stated that the bridge was the preferred alternative. So, Finland knew, even then, that the bridge was the preferred and more probable choice. Of course, Dr. Koskenniemi did go on to say that the 1987 Act "did not, of itself, constitute a very immediate threat".

Frankly, I am puzzled. Finland has, quite correctly, stressed that the scheme is an integrated whole. Let me again cite Dr. Koskenniemi — these are his words :

> "The point is, of course, that the three parts in the project — the West Bridge, the East Tunnel and the East Bridge — are interlinked, so that many activities, apparently unrelated to the final closing of the Great Belt, in fact anticipate it by excluding practical possibilities for accommodating Finnish interests and giving effect to Finnish rights in the event of a judgment in our favour." (CR 91/10, p. 32.)

I accept that : it is an interrelated or interlinked scheme. But surely that argues for a formal Finnish protest against the bridge alternative sooner rather than later ? It seems quite extraordinary that Finland should keep silent, knowing that

Denmark would begin the scheme, spending millions and millions of dollars, and keep its protest until a point in time so late that Denmark was already completely committed. The Agent for Finland suggested yesterday that one reason for the very late reaction of Finland was that the permanent link, especially in the form of a bridge, was the subject of acute political controversy within Denmark. The suggestion is, in effect, a suggestion that Finland was justified in believing that the bridge would never be built.

I must say I find this argument unpersuasive. Where Governments believe their international legal rights are under threat, they have an obligation to speak out. They would be unwise in the extreme to rely on public opinion in the other State to swing the balance in their favour and so render a protest unnecessary.

As to the rather provocative attempt to turn the acquiescence argument on its head and to argue that Denmark has acquiesced in the passage of Rauma-Repola's offshore installations between 1977 and 1987, I can simply reply that Denmark has not, and does not, object to the passage of these installations. The issue is not, can they pass? The issue is, can they pass without modification, either in design or method of transportation, via the Great Belt, so as to make it impossible for Denmark to complete the bridge link? That is the issue.

But the apathy, or acquiescence, of Finland is one thing. It is relevant in so far as it weakens Finland's claim that there is real urgency now. But it does not explain the basis of the present plea of urgency.

It must now be clear to the Court that the plea of urgency does not really relate to the passage of these offshore installations between now and the date of judgment on the merits. We shall have that judgment before 1994, before the bridge construction does actually impede passage.

No, the urgency relates to the need, perceived by Finland, to stop the bridge construction *now*. Because, if it is not stopped *now*, Finland believes it will be impossible to stop it later. In other words, the construction must be stopped now because, unless that is done, Finland doubts that it will be able, at a later stage, when the bridge nears completion, to get an order for the full restoration of its alleged right of unimpeded passage. As I said before, the purpose of this request for provisional measures is not really to protect Finland's rights but, rather, to keep open the possibility of the remedy of restitution at the merits stage. Sir Ian Sinclair put it very fairly yesterday, when he said:

> "completion of any one element would reduce the possibilities of modifying other elements so as to enable effect to be given *to any judgment of the Court on the merits*, if that judgment were to be in Finland's favour" (emphasis added).

So, this present request is really about protecting remedies, rather than protecting rights. And I make no apologies for saying that the present request is a request for a stoppage of all further construction. As the Court will readily see, Finland seeks to make this request more palatable by suggesting that some construction could continue, subject to some modifications of the scheme, which could be left to Denmark's discretion. But this is simply "window-dressing". These imaginative modifications are simply not practicable. So Finland does, in reality, seek a total stoppage.

Denmark, of course, recognizes that the rejection of the Finnish request does not mean that the Court has ruled in Denmark's favour on the merits. The merits are still to be argued and Denmark does not question the discretion which the Court has in the eventual choice of remedies permitted by law.

The risks for Denmark remain very considerable, both economically and commercially. But it is for Denmark to assess those risks, and the fact that Denmark is at risk is not a reason for making an order for provisional measures now. Any such order would in practice complicate Denmark's task, rather than simplify it.

2. PROPORTIONALITY

I very much welcome the concession by Professor Treves that it is relevant to consider the degree of proportionality between the benefits to one Party and the cost to the other, when the Court decides to grant, or not to grant, an order for provisional measures.

His analysis is worth pursuing. Let us follow his two hypotheses. First hypothesis: the Court rejects Finland's request. He suggests that Finland would then suffer serious disadvantages. He says there would be a change in the status quo which would prejudice its rights were the Court to subsequently find in its favour. I must say I find it difficult to follow what the change in the status quo would be. The Court would at this stage be making no finding about the legal rights of either Party. The only hint of a change given by Professor Treves is that the commercial possibilities of Rauma-Repola getting further orders might be affected. But, with respect, that takes us into the realm of speculation.

As for the so-called "advantage" to Denmark, he starts of by saying that Denmark will have "full freedom" to act — I assume he means carry on building — but then he immediately qualifies that by saying that the advantage to Denmark would be very dubious, since Denmark would take that course of action at very great financial risk, for the eventual judgment on the merits might be in favour of Finland.

On his first hypothesis, this "cost-benefit" analysis is clearly incomplete. Rejection of Finland's present request would not involve any restriction of the passage of these offshore installations prior to judgment on the merits. And, as he rightly points out, Denmark would remain at great risk, pending final judgment. So, if I may say so, I see nothing very disproportionate in the advantages or disadvantages suffered by the two Parties on this hypothesis.

His second hypothesis is that the Court accepts Finland's request. He suggests the advantage to Finland is that the status quo is maintained. In realistic terms, all that means is that perhaps one more unit might pass through the Great Belt without modification, prior to judgment on the merits — but even that passage is speculation. So we are dealing with minimal benefits to Finland.

But when we turn to the other side of the coin — the losses to Denmark — he describes these as "modest". But that is because he assumes much of the construction work can go on on the basis of the schemes for modification proposed by Ambassador Grönberg.

Of course, the moment one accepts, as realistically we must, that there is no practical possibility of implementing any of these schemes, Denmark's losses become anything but modest. The losses will become astronomical: nearly US$500 million to the Storebaelt Company alone, and quite incalculable losses to Denmark.

In short, the analysis by Professor Treves confirms a very simple truth. The moment you contemplate acceptance of Finland's request, and you exclude Ambassador Grönberg's modification schemes as so much wishful thinking, the reality of the "balance" is absolutely clear. The losses to Denmark will be enormous, and totally disproportionate.

3. The Question of Irreparability and the Remedy Sought by Finland

I suggested on Tuesday that the whole strategy of Finland's case was to prejugde the remedy it would seek in the eventual proceedings on the merits. Its aim, even at this stage, was to lay the ground for a claim to *restitution*, a claim that Finland, or more strictly Rauma-Repola, should enjoy unchanged and unmodified all the rights of unrestricted passage through the Great Belt which it had enjoyed prior to the plans for the East Bridge. It had no interest in a claim for compensation, in the event that the Court should hold, on the merits, that there had been an infringement of Finland's rights by Denmark, and assuming that Finland could prove consequential economic loss to Rauma-Repola.

I well understand that strategy. Indeed, for the purposes of an application for provisional measures, Finland was bound to adopt such a strategy. Because the moment Finland hinted in its request for provisional measures that any future claim might lie in damages, it would, in effect, be conceding that its injury was *not* irreparable. And that would destroy the basis of its claim for provisional measures.

So, Finland had to aim for restitution. That had to be the sole remedy in comtemplation. The notion that any claim on the merits might lie in damages, or compensation, was fatal to its request for interim measures. Of course, yesterday Professor Treves reminded us that in its Application — not the present request — Finland has asked for damages. But that is a little disingenuous. The Application seeks a declaration upholding all Finland's claimed rights of passage, and condemning the present bridge scheme as incompatible with those rights. It *is* a claim for restitution. The claim for compensation is in no sense an alternative claim — it is merely for a claim for compensation for any incidental losses.

But supposing the eventual claim for restitution is legally untenable ; supposing it is a claim which it is virtually impossible for the Court to grant : what then ? Would not that mean that Finland would have to be satisfied with compensation or damages, even if it won on the merits ? And would not that mean that the present request is fatally flawed, because any injury would be reparable by damages ?

Mr. President, with the leave of the Court I want to show now that this is indeed the case. It is no mere supposition. It is, in fact, the law that any claim on the merits by Finland could not be satisfied by an order for restitution, but could only be satisfied by compensation or damages.

The Court will be familiar with the work of the International Law Commission on the law of State responsibility. Indeed, many Members of the Court will be far more familiar with this work than I am — so I trust they will forgive what may seem an impertinence in drawing to their attention matters of which they are already fully aware.

But in 1988, at its fortieth session, the International Law Commission turned its attention to the remedy of restitution. It did so on the basis of a Preliminary Report by Professor Arangio Ruiz in document A/CN4/416/Add.1 of 27 May 1988.

At page 21 of that Report the Special Rapporteur turns to the question of "excessive onerousness" — to the proposition that the remedy of restitution will *not* be available where, to order it, would be excessively onerous for the State adjudged guilty of State responsibility. He cites Verzijl as follows :

> "It would be unreasonable to allow a claim for *restitutio in integrum* if

> this mode of reparation would impose a disproportionate burden upon the guilty State and if the delinquency can also be atoned by a pecuniary indemnification."

He points out that this is the view of many authors: of Verdross, of Personnaz, of Nagy, Cepelka, of Berber and Mann. It was the view of the Strupp draft of 1927, of the *Deutsche Gesellschaft* project of 1930, which contained the following provision:

> "Re-establishment may not be demanded if such a demand is unreasonable, and in particular if the difficulties of re-establishment are disproportionate to the advantages for the injured person."

Now consistently with this doctrine, the International Law Commission Report proposes the following Article 7 for the draft on State responsibility:

> "*Restitution in Kind*
>
> 1. The injured State has the right to claim from the State which has committed an internationally wrongful act, restitution in kind for any injuries it suffered therefrom, provided and to the extent that, such restitution:
>
> (*a*) is not materially impossible;
> (*b*) would not involve a breach of an obligation arising from a peremptory norm of general international law;
> (*c*) would not be excessively onerous for the State which has committed the internationally wrongful act."

Paragraph 2 goes on in these terms:

> "2. Restitution in kind shall not be deemed to be excessively onerous unless it would:
>
> (*a*) represent a burden out of [all] proportion with the injury caused by the wrongful act;
> (*b*) seriously jeopardize the political, economic or social system of the State which committed the internationally wrongful act."

The Court will readily see the relevance of this statement of the law. Restitution will not be available as a remedy where it would be a disproportionate burden on the delinquent State; or would seriously jeopardize its economic or social system.

I need not repeat the details of my earlier comparison of the likely economic losses: losses to Rauma-Repola of an entirely speculative character, and perhaps even then of no more than US$10 million over the next decade. Losses to the Danish Storebaelt Company, certain losses, of at least 30 times that amount and virtually inevitable. And losses to Denmark which are incalculable.

As to the jeopardy to the social and economic system of Denmark, can there be any doubt? The set-back will be enormous. The potential damage is incalculable.

So, Mr. President, we have here a situation which fits exactly into the notion of "excessive onerousness". It is *exactly* the situation in which restitution will *not* be granted.

So, where does this leave us? I would submit that it leaves us with the inescapable conclusion that, even if Finland should in due course succeed on the merits, any remedy will lie in damages, not restitution. And the consequence of that is that the injury apprehended by Finland *is* reparable — by damages. It is *not* irreparable. It therefore follows that this is not a case in which it would be appropriate to make any order for provisional measures.

STATEMENT BY MR. LEHMANN

AGENT FOR THE GOVERNMENT OF DENMARK

Mr. LEHMANN: Mr. President, distinguished Members of the Court, as you are well aware, counsel for the Danish Government, Dr. Jiménez de Aréchaga, could not remain with us today by reason of other commitments but had asked me to present his answers to the points made yesterday by Sir Ian Sinclair and by Professor Treves, with respect to his statement last Tuesday. Those answers are embodied in the statement I shall now make.

Sir Ian Sinclair stated that the Court in its jurisprudence concerning the interim measures: "has been very careful in refraining from any preliminary determination of the merits of the case at the stage of an application for interim measures".

That is true and it is easy to understand why. For the Court to pronounce expressly in an order concerning interim measures, on the existence or scope of the rights involved by an applicant would, of course, constitute a prejudgment of the final decision on the merits.

But this cannot mean that the existence and scope of the substantive rights cannot be discussed by counsel or should be absent from the mind of the judges when deciding such a serious matter as a request for interim measures.

If it were otherwise it would be difficult to understand why the 1972 Rules of Court, when dealing with the procedure to be followed upon a request for interim measures, requires the applicant to specify "the rights to be protected", a requirement which is implicitly retained in the present Rules. It appears, therefore, that the *existence* of the right is something which an applicant State must demonstrate in making a request for provisional measures. Without clear evidence of a right, there is nothing for the Court to protect. But, obviously, any issue of the *violation* of that right, if it exists, is a matter for later consideration on the merits.

Finally, Professor Treves accepted to discuss the challenge raised by Denmark against the scope of the right invoked by Finland, although somewhat reluctantly.

His basic contention was that the unlimited and elastic right alleged by Finland with respect to oil platforms and other structures exists in the Danish straits as a customary régime.

However, Professor Treves did not explain how and when such a customary régime was established, with its special characteristics of being unlimited in its height and elastic in its future development. He did not explain either — if that customary régime had been established — why both Denmark and Finland jointly requested the Third United Nations Conference on the Law of the Sea to insert a specific provision exluding their straits from the transit passage régime. Neither Ambassador Fergo, nor Judge Manner, when requesting this exception, invoked the pre-existence of an established objective régime.

Moreover, the two States replaced the alleged customary régime upon ratifying the 1958 Geneva Convention. In the exercise of the broad regulatory competence granted by this Convention, Denmark has regulated the navigation of "ships of special characteristics", such as tankers. That regulatory competence comprises the fixing, at the appropriate time, of reasonable clearance limits for the floating equipment which seeks to go through the straits.

If States did not have this regulatory competence any new bridge would be open to challenge, because offshore technology already makes possible rigs so high that no bridge could accommodate them, without their being dismantled before passage. Even bridges which crossed straits where another high seas route was available would be open to challenge. For an offshore construction company could still argue its passage was obstructed, and claim for the excess costs of detour via the longer high seas route.

Finally, the alleged existence of objective régimes, imposed by certain States with effect *erga omnes*, is a thing of the past, not accepted in contemporary international law. The records of the Vienna Conference on the Law of Treaties and of the International Law Commission demonstrate that such legal situations as free navigation for all States are based on stipulations in favour of third States. That is the position of Finland with respect to the 1857 Treaty and as a third party beneficiary it cannot claim rights that go beyond those which have been established by the parties to the treaty.

* * *

I now come to my own remarks, Mr. President, distinguished Members of the Court.

I want first to comment upon the submissions advanced by Finland with regard to the indication of provisional measures. And I must confess that what Finland asks for continues to be something of a puzzle. Thus, in the Finnish written request of 22 May 1991 we find the following wording in paragraph 13 of the request — and I quote only the pertinent words :

> "Denmark should, . . . refrain from contuining or otherwise proceeding with such construction works in connection with the planned bridge project over the East Channel of the Great Belt as would impede the passage of ships, including drill ships and oil rigs, to and from Finnish ports and shipyards . . . [secondly] . . . Denmark should refrain from any other action that might prejudice the outcome of the present proceedings."

Here we find both a rather concrete indication of the measures sought : namely abstain from construction work on the East Bridge which would impede the passage of ships and oil rigs and a blanket indication that Denmark should abstain from any other prejudicial action.

As we have shown, there will be no impediment to the passage of any oil rig before the end of 1994 at the earliest. So there is no need for the Court to grant that part of the request. And as to the blanket prohibition that is not an appropriate one, because it could potentially cover almost any Danish action concerning the entire Great Belt traffic link.

If one goes through the Verbatim Records of Finland's presentation — and I shall spare the Court from doing so in detail — one will realize that the Finnish position changes all the time between stating that no blanket prohibition will do, and then almost in the same breath suggesting exactly that by requesting the Court to order a general indication of no prejudicial action on the part of Denmark.

May I refer to Sir Ian's statement on page 44 and page 68 of the Verbatim Records (CR 91/9) and to Dr. Koskenniemi's statement on pages 34 to 35 of the Verbatim Records (CR 91/10).

Yesterday morning the Agent for Finland reiterated this inherent contradiction. He said : "What Finland is requesting is *not* the complete cessation of the fixed link project" (CR 91/13, p. 13) and almost in the same breath :

> "What Finland is requesting is instead . . . a *general* declaration by the Court that the project should not be carried out, pending a judgment, in such a fashion as to prejudice the rights claimed in the main proceedings."

Now what is Finland seeking? A blanket prohibition or a minimum of necessary measures? Or has Finland actually left the whole operation to the discretion of the Court? That actually appears to be the case because Dr. Koskenniemi referred to:

> "the possibility that the Court might need to indicate more specific measures, should the Danish Government fail to take adequate measures to protect Finnish rights and interests" (CR 91/10, p. 34).

The idea, apparently, is that starting from an initial and very vague order, the Court will issue further more specific orders as circumstances require. So, we may foresee a whole series of proceedings between now and the merits stage. I presume the Court will need its own technical experts present at the site of the Great Belt Project, to advise it on what can, and should, be done. The Court will have to judge for itself the practicability of this extraordinary idea.

Or could it be that all this uncertainty simply reflects the fact that the indication of provisional measures in relation to an integrated construction project such as the fixed traffic link across the Great Belt, which is already at a very advanced stage, is not an appropriate remedy? I believe it does. I believe that Finland during these proceedings has come to realize that restitution in kind is not an appropriate legal remedy, given the factual and legal circumstances of the present case. The practical solution to the present problem lies in the offers the Danish Government has made to co-operate with Finland in finding mutually acceptable ways and means to guide the Finnish oil rigs through the Danish straits and, if need be, to render technical assistance in dismantling and assembling those parts of the rigs which are too high to pass under the bridge in the Eastern Channel of the Great Belt. The Court's judgment on the merits of the case will then decide who is going to pay for these adjustments.

My colleague and friend, Ambassador Grönberg, stated something to this effect but in the reverse order. He said in his initial address to the Court:

> "This is what we have come to seek from the Court. We seek, first a declaration of our rights in this matter. On the basis of that declaration, we then aim to attain negotiations on the different technical alternatives which might be used to safeguard our rights while taking account of the legitimate needs of Denmark." (CR 91/9, p. 26.)

The Government of Denmark of course shares this aim of finding peaceful solutions to any dispute through negotiations. But is not Finland putting the cart before the horse in seeking first a declaration of its rights and then starting negotiations? What is the meaning of that suggested procedure which does not correspond at all to the task of the Court during the preent proceedings, which are not aimed at passing final judgment on the right of passage through the Great Belt? Moreover why do we need to negotiate if the Court has granted the absolute right of unimpeded passage which Finland is seeking ? It will then be up to Denmark simply to implement the judgment and provide the passage granted to Finland. Or is Finland trying to obtain an advantage in any future negotiations by having the Court indirectly recognize its contention about the right of unimpeded passage through the Great Belt? If so, such an approach, obviously, will not further the prospects of successful negotiations.

Mr. President, you and your colleagues probably know the old saying about lawyers. They can be divided into two groups: those who seek solutions to all problems and those who see problems in all solutions. I think that the Danish team would like to be identified with the first group of lawyers, but unfortunately we have been left with no other choice by Finland but to appear before this Court and state our case. Finland has neither during our bilateral contacts nor during these pleadings ever suggested that a solution might lie in some modification to their very few oil rigs which may not otherwise be able to pass under the East Bridge in the Great Belt.

* * *

I now come to my concluding remarks and statement of our final submissions.

Mr. President, distinguished Members of the Court, you have now been presented with the Danish oral arguments concerning the subject matter before you, and I shall spare the Court from repeating, even briefly, the arguments advanced by the Danish side. I would like, however, to draw the Court's attention to the following points when deliberating on the case.

The request for provisional measures is submitted at a point in time when a sovereign decision of the Danish State has been made in good faith and in full reliance upon the acceptance by the international community of that decision. To grant the request under these circumstances would be disruptive to orderly relations between States.

We are furthermore dealing with a case where no irreparable damage would ensue for Finland if provisional measures are not indicated. Finland itself has indeed conceded this fact by submitting that Finland in particular reserves its right to claim compensation for any damage or loss arising from the bridge project (see paragraph 33 of the Application and paragraph 135 of the Written Observations). Any damage to the private Finnish company, or other branches of Finnish private industry, can be compensated by the payment of a certain amount of money, whereas the damage to Denmark will have wide repercussions on Danish society as a whole.

Another striking element of the case relates to the fact that the alleged Finnish right to be protected cannot be substantiated to any reasonable degree. The right to be protected should be Denmark's right as a strait State to construct a bridge over its territorial waters respecting established international standards with regard to both vertical and horizontal clearances.

Finally, the question of an unimpeded right of passage will not pose any real problem before the end of 1994, i.e., after the Court has passed judgment on the merits of the case. Consequently, there is no urgency requiring the indication of provisional measures.

For all the reasons — of a factual, reasonable and legal character — advanced by the Danish Government in its Written Observations and during these oral pleadings, I respectfully request the Court:

(1) to adjudge and declare that the request of Finland for an order of provisional measures be rejected;

(2) in the alternative, and in the event that the Court should grant the request in whole or in part, to indicate that Finland shall undertake to compensate Denmark for any and all losses incurred in complying with such provisional measures, should the Court reject Finland's submissions on the merits.

CLOSING OF THE ORAL PROCEEDINGS

The PRESIDENT : We are now at the end of the oral proceedings in this case concerning the *Passage through the Great Belt (Finland v. Denmark)* and the Court must now proceed to its deliberation in accordance with Article 54 of its Statute and will announce its decision over the matter in due course.

Before closing the proceedings, however, I should like, on behalf of the Court, to thank the Agents, counsel and delegations of both Parties for the very helpful way in which they have co-operated with the Court in making the arrangements for these hearings and, if I may, to congratulate them also on the way in which a strenuous argument has not been allowed to alloy the traditional friendly relations between the two countries concerned.

As is customary I must finally request the Agents of the Parties to remain at the disposal of the Court for any further information or assistance it might require and with that reservation I now declare the oral proceedings closed.

The Court rose at 4.30 p.m.

SEVENTH PUBLIC SITTING (29 VII 91, 10 a.m.)

Present: [See sitting of 1 VII 91, 10 a.m.]

READING OF THE ORDER

The **PRESIDENT**: The Court meets today to deliver its decision on the request for the indication of provisional measures dated 22 May 1991 and filed in the Registry on 23 May 1991 by the Republic of Finland in the case concerning *Passage through the Great Belt (Finland v. Denmark)*.

It will be recalled that the proceedings were instituted on 17 May 1991 by the filing in the Registry of the Court of an Application by the Government of the Republic of Finland against the Kingdom of Denmark.

I shall now read the Order made by the Court on this request, omitting as is customary the preliminary formal recitals. I will therefore begin the reading at paragraph 13 of the Order.

[The President reads paragraphs 13-38 of the Order[1].]

I shall now call upon the Registrar to read the French text of the operative clause of the Order.

[Le Greffier lit le dispositif en français[2].]

The **PRESIDENT**: The decision of the Court is unanimous. Judge Tarassov appends a declaration to the Order of the Court; Vice-President Oda, Judge Shahabuddeen and Judge *ad hoc* Broms append separate opinions to the Order of the Court.

In accordance with practice, the Order has been read today from a duplicated copy of the text, a limited stock of which will be available to the public and to the press. The usual printed text of the Order will be available in the near future.

There being no other matters before the Court today, I declare the present sitting closed.

(*Signed*) R. Y. Jennings,
President.

(*Signed*) Eduardo Valencia-Ospina,
Registrar.

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[1] *I.C.J. Reports 1991*, pp. 15-21.

[2] *C.I.J. Recueil 1991*, p. 20-21.

MEMORIAL OF FINLAND

MÉMOIRE DE LA FINLANDE

PART I
INTRODUCTION

1. The present Memorial is submitted to the Court in pursuance of the Court's Order of 29 July 1991, in which the Court fixed the time-limit of 30 December 1991 for the submission of the Memorial of the Republic of Finland in this case.

2. This case concerns the right of passage of ships and vessels, including offshore craft and other special ships, to pass through the international strait of the Great Belt. This right, enjoyed by Finland, is threatened by the Danish plan to build a high-level bridge over the strait with a maximum clearance of 65 metres over the median-water level. The question that is posed to the Court is whether Denmark, as the coastal sovereign, is entitled unilaterally to undertake building works in an international strait so as to restrict the right of passage in the Great Belt to ships with a maximum height of 65 metres or less.

3. To that extent, the case is essentially about the application of general international law regarding straits to the circumstances of the Great Belt. What is the scope of the right of passage in an international strait? A particular aspect of this case, however, relates to the geographical situation of Finland in relation to the Danish straits. Finland possesses a coastline only in the Baltic. The straits are the only natural waterway between the Baltic and the North Sea. In a sense, the freedom of navigation, for Finland, is only as wide - or narrow - as the right of free passage in the Danish straits.

4. A bridge height of 65 metres will be able to accommodate most but not all existing ships. There are types of special ships and carriages whose passage will be obstructed by such a bridge. These include certain ultra-large crude carriers (ULCCs), very large cruisers, drill ships, self-propelled semisubmersible drill rigs, and crane vessels . In addition, passage by heavylift transport ship or under tow of certain types of mobile offshore drill rigs and cranes will be prevented by a bridge at a height of 65 metres. Such passages occur as a matter of routine between Finland and locations outside the Baltic.

5. The bridge is intended to stay in place for at least 100-150 years. It is therefore reasonable to take into account foreseeable trends in ship design and size. There are many kinds of ships under construction or design whose dimensions vastly exceed the height of 65 metres.

6. It has sometimes been argued that an alternative passageway - the Sound (Öresund) - will remain open even after the completion of the Great Belt bridge and that passages obstructed in the Great Belt can be compensated there. This cannot be accepted. In the first place, it is uncertain whether the existence of an alternative passage-way is sufficient, in law, to justify curtailing existing passage rights in what is undoubtedly an international strait (Cf. *Corfu Channel* case, *ICJ Reports 1949* p. 28). In the second place, a significant physical circumstance for this case is that the only deep-draught passage-way between the Baltic and the North Sea exists in the Great Belt. While the Great Belt is traversed by the IMO recommended "Route T" which has a minimum depth of 17 metres, the main alternative passage-way - the Sound - has a depth of only 7,7 metres. The Danish bridge plan will thus make it physically impossible for ships of more than 65 metres high and with a draught approaching 7,7 metres to navigate between Finland and world oceans.

7. The legal issues posed to the Court are relatively simple. There is no dispute about the jurisdiction of the Court. Nor is there any dispute regarding the character of the Great Belt as an international strait. Finland and Denmark agree also that navigation in the Great Belt is covered by a regime of free passage. But they construe the right of free passage in different ways. The Court is requested to give an authoritative interpretation regarding the meaning of "free passage" and what liberty this leaves to the coastal State to engage in unilateral projects with the result of limiting existing passage.

8. There is no dispute between Finland and Denmark about the latter's right to connect two parts of its land territory so as to improve its internal traffic conditions. Finland is not

disputing Denmark's right to build a bridge over the Great Belt. The difference of opinion relates to what considerations Denmark should take into account when undertaking such construction.

9. It has been generally recognized that unhampered passage through international straits constitutes an indispensable safeguard for the undisturbed development of international trade. All States have an interest in a regime that enables ships to pass through outlets which can be classified as "international straits". On the other hand, it has likewise been affirmed that coastal States have a legitimate interest in ensuring that straits passage does not pose an unacceptable threat to their interests. The existing law is the outcome of a reconciliation between these two sets of considerations.

10. The right of passage in the Great Belt is derived from several sources. The special regime of the Danish straits is a combination of the *1857 Copenhagen Treaty on the Redemption of the Sound Dues* and general customary international law. Both provide for unhampered passage. The relevant provision of the former is Article 1 which, in its authoritative French text, provides that

> "Aucun navire quelconque ne pourra desormais, sous quelque pretexte que ce soit, être assujetti, au passage du Sund ou des Belts, à une détention ou entrave quelconque;"

This is complemented by the general customary law regarding passage through international straits and providing for non-suspendable innocent passage. As this Court observed in 1949:

> "It is, in the opinion of the Court, generally recognized and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State, provided that passage is innocent. Unless otherwise prescribed in an international convention, there is no right for a coastal State to prohibit such passage through straits in time of peace". (*ICJ Reports 1949* p. 28.)

The standard of non-suspendable, innocent passage was adopted in the *1958 Convention on the Territorial Sea and the Contiguous Zone*, ratified by Denmark and Finland. The relevant provision is Article 16 (4):

> "There shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas, or the territorial sea of a foreign State."

The issue of straits passage was also one of the central elements in the reform of the law of the sea undertaken by the Third United Nations Conference on the Law of the Sea. Though the *1982 Convention on the Law of the Sea* is not yet in force, and the extent of its applicability in the present dispute is unclear, there is no doubt that the deliberations of the Conference have had an effect in developing an emerging customary right of an even more liberal regime of passage.

11. In the Finnish view, it is not strictly necessary to form an opinion about the relative precedence between these various sources governing passage rights in the Great Belt. Each of them prohibits unilateral action of the kind contemplated by Denmark.

12. On the Danish side, it has been argued that the right of free passage in the Great Belt extends only to "existing ships" and that therefore it is not enjoyed by the various types of large or special ships, including existing offshore craft (drill ships, semisubmersible or jack-up rigs) and ships that might conceivably be constructed in the future.

13. Whatever the merits of this argument, a bridge of 65 metres' free clearance excludes several types of existing craft unquestionably classified as "ships", such as certain ultra-large oil tankers, crane vessels and drill ships which may have an air draught of 80 metres or even more. But free passage was never restricted to certain types of ships only, or to ships only with certain kinds of cargo. As a matter of practice as well as theory, free passage has been enjoyed by very large special craft, whether moving by their own propulsion, towed, or carried on heavylift transport ships.

14. The concept of a "ship" lacks a precise definition in international law. In a way, this follows as a matter of course from the fact that any such definition would be dependent on the types of technology available at the time of definition. Much of the argument between Finland and Denmark has been about whether certain special craft, in particular semisubmersible drill rigs and jack-up rigs, can be classified as "ships" or otherwise enjoy a right of passage. In the Finnish contention they are indeed classified as "ships". And in the law of most maritime States they are held to be "ships", albeit sometimes possibly ships with certain special characteristics.

15. Looking at the applicable law solely from the perspective of an abstract definition, however, would be somewhat too doctrinaire a perspective on a matter of high practical importance. Therefore, it is the Finnish contention that whatever the result of the definitional exercise, there is no basis for denying that the normal rules of navigation apply to these craft in the same way as they apply to more conventional types of ships. Indeed, the practice of the most important coastal States fully confirms this. There is not one single case in which a coastal State has denied that a semisubmersible drill rig or jack-up in transit enjoys the right of free (innocent, transit) passage through its territorial waters or an international strait.

16. Likewise, international practice fully confirms that the right of free passage is not subjected to qualifications or limitations upon the types of carriage other than those which flow from the requirement of "innocence". That the vessel has exceptional dimensions is not a criterion for its "non-innocence". Nor is the right of passage restricted to existing types and sizes of vessels. If it were, development in shipbuilding would have been, and would be, seriously hampered. Finland accepts, however, for the purposes of this case, that the criterion of "foreseeability" is sufficient to safeguard the coastal State's interests while allowing for technical and economic innovation.

17. It has sometimes been claimed on the Danish side that Denmark's interests in constructing a bridge so vastly outweigh Finland's interest in maintaining free passage that it would be unreasonable to uphold Finland's rights in their full extent. This argument is untenable for two reasons.

- First, the balance between the interests of the community and those of the coastal State regarding passage rights in international straits has been set by international customary law as well as the several treaties applicable to particular situations. The Court is not called upon to establish an *ad hoc* balance but to apply the law. And it should apply the law because the law itself is an expression of the agreed balance.
- Second, the Danish view miscasts the opposing interests. Finland is not arguing that Denmark should abandon its project but rather that Denmark should carry it out in such a way that the right of passage is not violated. This would be possible by means of an opening in the East Bridge, for example. The question is not whether Denmark may construct its fixed link but whether it should construct it as planned or with a modification upholding existing Finnish right.

18. In addition, the importance of the economic and social consequences of the bridge plan to Finland must be stressed. Finland has an important shipbuilding industry. The competitiveness and survival of this industry is largely based on its orientation towards the

construction of special ships many of which have large physical dimensions. Among these are offshore craft. Were the bridge to be built in its planned form, much of the security of shipbuilding and those companies and individuals that depend on it would be threatened and offshore industry in Finland would be finished.

19. The Court's judgment in the *Corfu Channel* case contained an authoritative statement on the right of innocent passage in international straits. The *Great Belt* case will have an equally important significance in clarifying the extent to which that right extends to large and special vessels, including craft used in offshore exploration, exploitation and related purposes.

20. Article 59 of the Court's Statute provides, of course, that judgments have no binding effect except between the parties and in respect of each particular case. Nevertheless, as a fact of legal history and juristic reason, the Court's statements enjoy a privileged authority in clarifying the content of general international law. Its judgment in this case will thus have immediate significance in determining the law regarding navigational conditions enjoyed by special ships in international straits worldwide. It will also have a bearing on the carrying out of plans to establish links across other international straits.

21. This Memorial has been organized as follows: Part II will lay down the factual background of the case. It will describe the geographical, historical, technical and economic aspects of the case. Part III sets out the applicable law in three chapters: the right of passage in the Great Belt, the ships enjoying that right and an examination of the argument that Finland acquiesced in the current Danish project. The submissions are contained in Part IV.

PART II
THE FACTS

CHAPTER I

ASPECTS OF GEOGRAPHY

Section I. The Geographical Perspective: Finland's Position

1. As Erik Brüel notes in his famous lectures on the Danish straits, the straits not only separate parts of Danish territory but also link together pieces of territory otherwise separated by the sea. He continues by outlining what is probably the most significant geographical aspect of the present case:

> "Pour les Etats de la Baltique, notamment pour ceux qui n'ont accès à la mer qu'exclusivement - ou presque exclusivement - comme la Finlande, par les détroits (ou par le canal de Kiel), ceux-ci revêtent une importance vraiment vitale, au point de vue tant économique que politique."[1]

2. The three Danish Straits at the only entrance to the Baltic have always formed an important channel for international navigation between the Baltic and the North Sea. For some countries, such as Finland, the straits form the only natural waterway between their coasts and world oceans (Cf. *Map 1: The Baltic Sea*). For those countries, any change in the conditions of passage in the Danish straits is a matter of great importance.

3. Despite its geographically disadvantaged position at the eastern end of the Baltic Sea, however, Finland is also a maritime country with an important shipbuilding industry and a marked dependence on maritime transports for its economy. About 90 per cent of Finnish exports and 80 per cent of Finnish imports are carried by sea. Out of the transports of 1990, 45 per cent passed through the Danish straits.

4. The conditions of passage in the Danish straits are thus a matter of great concern for the Finnish economy and society. In the following paragraphs, those conditions are surveyed from the perspective of navigational geography.

Section II. The Geography of the Straits: A General Description

5. The entrance from the North Sea to the Baltic consists of six straits: The Kattegat, Samsø Belt, the Sound, Little Belt, Great Belt and Fehmarn Belt. Out of these, the first two can also be described as part of the North Sea proper. Both of them - unlike the other four - contain a relatively wide high seas channel in the middle. Fehmarn Belt forms a waterway between the island of Fehmarn and the German North Coast. It is not a direct connection between the North Sea and the Baltic. In addition, the Kiel Canal forms an important artificial waterway linking the North Sea with the Baltic at the city of Kiel in Germany *(Map 2: The Danish straits)*.

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[1] Erik Brüel, "Les détroits danois au point de vue de droit international", 55 *Recueil des Cours* (1936 I), p. 604.

6. It is common to treat as the Danish (or Baltic) straits the more limited group of three straits consisting of the Sound and the two Belts, Little Belt and Great Belt[1] - the "Baltic Sea Accesses".[2]

Section III. The Great Belt (Storebælt)

7. The Great Belt is situated between the Danish islands of Fyn-Langeland in the west and Sjaeland-Lolland in the east. Its total length is about 60 kilometres. It is delimited in the north (as against Samsø Belt) by a line from Fyns Hoved to Rosnaes and in the south (as against Fehmarn Belt) by a line from Gustav Flak to Kappel Church (*Map 3: The Great Belt*).

8. The width of the Great Belt varies between 18.5 and 28.2 km. It is divided in the middle by Sprogø island into two channels, the *West Channel* (Vesterrenden) between Nyborg (Fyn) and Sprogø, and the *East Channel* (Østerrenden) between Sprogø and Halsskov (Sjaeland). The navigable route in the West Channel is about 3,3 km wide and in the East Channel about 1,7 km wide. The depth of the Great Belt varies between 20 and 25 metres but extends to 66 metres at Langeland.

9. Tidal variations in the depth of the Great Belt are insignificant, ranging from 0 to 0.4 metres. More important causes of water-level variation are wind and atmospheric pressure. Persistent westerly wind forces water from the North Sea through the Kattegat further down into the Sound and the Great Belt, "resulting in an overall rise of the sea level. Under extreme conditions, up to 2,0 m above mean sea level have been registered at several locations. Strong easterly winds have the opposite effect (negative stow)".[3] Also the flow of rivers and streams emptying in the Baltic contributes to what has been described as a "complex pattern of variation in the water column everywhere in the Baltic approaches".[4] The Great Belt is relatively well protected from waves. The probability of variations in wave height exceeding 1 m is only about one per cent.

10. Wind and changes in the water level may cause currents and current changes in the different parts of the strait. The current speed may exceed 1.5 metres/second. Cross currents and sudden current changes may make navigation more difficult, especially in narrow parts of the strait.

11. In normal conditions, navigation through the Great Belt does not pose particular difficulties. Nevertheless, weather and climatic conditions may cause problems. For this reason, and because of increased vessel size and volume of traffic, the Danish Government established the internationally recognized navigation route - the Route T - in 1975, which passes through the Great Belt (cf. further Section V below).

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[1] Erik Brüel, "Les détroits danois au point de vue de droit international", 55 *Recueil des Cours* (1936 I), p. 599; Gunnar Alexandersson, *The Baltic Straits*, (1982) p. 69.

[2] Harald Löschner, "Shipping Routes to and within the Baltic Sea", 30 *Außenpolitik* (1979), p. 277.

[3] Anker Nissen, "Route T. A Major Danish Waterway", 72 PIANC - AIPCN - Bulletin, (1991). See Annex 1.

[4] *Ibid.*

Section IV. A Comparison of the Navigational Geography of the Straits

12. To understand the significance of the Great Belt it is useful to look briefly into the characteristics of the alternative waterways, and the considerations of law and geography which have made the Great Belt the most significant of the straits for heavy international traffic.

13. *The Little Belt* is enclosed within the baselines of the Danish territorial sea and is a part of Danish internal waters. It is situated between Als (Jutland) and Aerø (Fyn) and delimited in the north by a line from Aebelø to Bjørnsknude and in the south from Pøls-Puk to Vejsnes nakke. The passage has a length of 68 miles and a minimum depth of 11.8 metres. The width of the Little Belt varies between 700 metres and 27.5 km.[1]

14. In May 1935, a bridge was opened over the Little Belt at Snaeveringen, connecting the Jylland peninsula with the island of Fyn. The bridge restricted passage to ships with a maximum height of 33 metres.

15. Navigational conditions in the Little Belt can be difficult. The northern section of the Little Belt is deep and narrow but in the central section detached shoals restrict navigation somewhat. Also, "The current is strong in the Belt, up to three metres per second. 'Eddies' are formed."[2] This, too, may cause difficulties for navigation.

16. *The Sound* (Øresund/Öresund/Sund) is the easternmost of the three entrances from the Kattegat to the Baltic (cf. *Map 4: the Sound*). It is situated between Sjaeland and the southwest coast of Sweden (Skåne). It is delimited in the north by a line from Gilbjerg Hoved (Sjealand) to Kullen (Sweden) and in the south from Stevns Klint light (Sjaeland) to Falsterbo (Sweden). Its width varies between 4 and 47 km.

17. The Sound is divided in its northern part into an eastern and a western channel by the island of Ven. The 8.3 km wide western channel between Ven and Sjealand is the more commonly used. In its southern part, the Sound is divided again into two channels: the Drogden on the Danish side, Flintrännan on the Swedish side. Drogden is situated between the islands of Amager and Saltholm and passes by Kastrup (Copenhagen Airport).

18. The Sound is the shortest route between the eastern Baltic and the North Sea, but the draught of the vessels using it is limited by the depths of its principal channels in the southern part. The deeper channel is Drogden on the Danish side. Its depth is 7.7 metres, while that of the Swedish Flintrännan is only 7.1 metres.

19. The Drogden Channel is approximately 4 miles long and has a minimum breadth of 290 metres. In 1900 the Drogden was dredged from 6 to 7 metres and in 1923 from 7 to 7.7 metres, which is its current depth.

20. On 23 March 1991 a Treaty was signed between Denmark and Sweden on the construction of a fixed link over the Sound[3]. According to the present plan, the link will be completed as a combined rail and road bridge except for a section of Drogden at Kastrup-southern Saltholm, where the link is to be placed in a submarine tunnel.

21. *Kiel Canal.*[4] The 99 km long Kiel Canal was opened under the name of Kaiser-Wilhelm-Kanal in 1895 and is situated fully within German territory. It has been dredged

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[1] US Defense Mapping Agency, *Sailing Directions (Enroute) for the Baltic Sea (Southern Part)*, Pub. No. 194, 5th ed., 1989.

[2] Gunnar Alexandersson, *The Baltic Straits*, (1982), p. 65.

[3] Cf. Annex 2.

[4] Cf. Rainer Lagoni, "Kiel Canal", Bernhardt (ed.) 12 *Encyclopedia of Public International Law*, (1987) pp. 200-202.

and broadened several times. Its present mimimum depth is 36 feet (11 m). There are nine bridges over the Canal which have a clearance of 42 m. For ships with dimensions exceeding those of the Canal and its bridges, the Danish straits are the only access to and from the Baltic.

22. By the Treaty of Versailles of 28 June 1919, the Kiel Canal was internationalized. The Canal was to remain open for the ships of all States in peace with Germany on the basis of full equality. In 1936 Germany declared that it was no longer bound by the the relevant Articles of the Versailles Treaty noting, however, that navigation on German waterways remained free on condition of reciprocity. This declaration has not been revoked by Germany. Today, foreign merchant ships in the Canal are accorded the same treatment as ships in German internal waters, except that ships in transit are exempt from customs duties. Warships and other public non-commercial ships must obtain prior permission through diplomatic channels for passage through the Canal.

Section V. Route T: The Primary Significance of the Great Belt

23. The Great Belt is the only deep-water passage between the Baltic and the North Sea. It has therefore always been used by large ships. By the early 1970's, traffic in the Great Belt had vastly increased and the average size of ships had grown. Concern was then directed at the need to prevent collisions or groundings of large vessels, and particularly tankers, in the narrow waters of the Belt.[1]

24. To avoid collisions and groundings with a potential for causing environmental catastrophe, it was decided to establish an internationally surveyed and well-marked transit route with a guaranteed minimum clearance. International Maritime Organization (IMO) Resolution A.339 (IX) was adopted in November 1975 with the title "*Recommendation on navigation through the entrances to the Baltic Sea*"[2]). The Resolution recommended that a routing system be established so that ships over 40.000 DWT or having a draught of 13 metres or more might safely navigate between the area of Skagen (the northern tip of Jylland peninsula) and Gedser Rev (Fehmarn). Pilotage services were recommended for ships with a draught of 13 metres or more. The Resolution noted the possibility of draughts being reduced by as much as 2 metres due to unknown moving obstructions.

25. Subsequently, the Danish authorities issued a booklet on Route T. This was the transit route between Skagen and the area North-East of Gedser, with a minimum depth of water of 17 metres. The direction of Route T is marked on Map 3. Route T passes through the East Channel of the Great Belt.

26. Though the official depth of Route T is 17 metres, the under-keel clearance recommended is 2 metres, so that the effective draught for ships using the Route T is 15 metres[3]. The route is marked by light buoys and lights. There are 14 lighthouses at the entrance to and in the interior of the Great Belt. Danish pilot assistance is available and recommended for large vessels. Because of heavy traffic, ships are expected to participate in a radio reporting service (SHIPPOS).

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[1] Cf. also Annex 1.

[2] Annex 3.

[3] For the underkeel clearance, see Annex 4.

27. One of the traffic separation schemes in Route T - "Between Korsør and Sprogø" - is situated in the Eastern Channel precisely at the point which the projected bridge is intended to cross. At that point, the southgoing traffic is directed into a navigational channel 550 metres wide and 19 metres deep, and northgoing traffic into a channel 600 metres wide and 17 metres deep.

28. On 19 November 1987 a new resolution was adopted by the IMO on navigation through the entrances to the Baltic Sea[1]. This Resolution was adopted on the initiative of the Governments of Denmark and Sweden. It repeats the contents of the 1975 Resolution and adds a provision concerning ships carrying a cargo of class 7 radioactive materials as specified in the International Maritime Dangerous Goods Code.[2]

29. Despite the establishment of Route T, the Government of Denmark has continued to express concern about the possibility of pollution due to collisions or groundings in the area. The use of pilots has been recommended, and Denmark has taken steps internationally to introduce compulsory pilotage for all ships exceeding 20.000 GRT carrying dangerous cargoes in bulk when traversing the entrances to the Baltic Sea.[3]

30. The navigational route into Finland's deepest harbours - the harbours at Pori and Kotka and the oil harbour at Sköldvik - has a draught of 15.3 metres. As explained in Annex 4, this corresponds to the effective draught of Route T, taking account of the recommended underkeel clearance of 2 metres. In fact, the depth of Finland's deep-water channels has been specifically measured to accommodate all ships that are able to enter the Baltic *via* the Route T. The channels leading to other important commercial harbours in Finland apart from those already mentioned also have a draught far in excess of the 7.7 metre draught of the Drogden.

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[1] Annex 5.

[2] Cf. *Routeing of Ships. Navigation through the Entrances to the Baltic Sea. Note by the Governments of Denmark and Sweden.* International Maritime Organization. *Sub-Committee on Safety of Navigation. 32rd Session.* Agenda Item 3. Doc. NAV 32/3/2. 24 January 1986.

[3] Cf. *Proposal for certain mandatory use of pilotage services for ships over 20.000 GRT carrying dangerous cargoes in bulk in the Baltic Sea Area, submitted by Denmark.* Baltic Marine Environment Protection Commission - Helsinki Commission. *Maritime Committee. 17th Meeting. Hamburg. Germany 24-27 September 1991.* Doc. MC/17/5/1. 19 August 1991.

CHAPTER II

THE GREAT BELT IS AN INTERNATIONAL STRAIT

31. The two problems that have given rise to most discussion among jurists regarding the law of international straits are the definition of an "international strait" and the character of the regime applicable in such a strait. As regards the former question, it seems clear that the Great Belt is an international strait - despite the fact that it is enclosed within Denmark's territorial sea. This part of the memorial will give a brief historical overview of the development of the international status of the Danish straits and its recognition by Denmark.

Section I. The International Status of the Baltic and the Law of the Straits

32. The navigational regime of the Danish straits is a function of the status of the Baltic Sea. Were the Baltic a closed sea *(mare clausum)*, there would be no reason to assume, *a priori*, the existence of a right of free passage in the straits. Conversely, were there no freedom of passage in the straits leading to the Baltic, the Baltic would by that very fact become a *mare clausum*.

33. Nowadays, the Baltic is an international sea which encloses large areas of high seas. There is a history to the openness of the Baltic - a history which underlines the international character of the passage regime in the Danish straits. This history can be recapitulated under two headings:

- The abolition of the Sound Dues;
- The rejection of the idea of *dominium maris Baltici*.

A. THE ABOLITION OF THE SOUND DUES

34. The early history of the regime of passage in the Danish straits is dominated by the question of the Sound dues.[1]

In 1429, the Danish King Eric of Pomerania began to levy a duty on international shipping passing through the straits, thus asserting full Danish dominance over straits passage.[2] A long line of Danish kings followed his example, in order to ease their financial situation. At their peak, the dues constituted some two-thirds of the Danish State budget.

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[1] There is a very extensive literature on the question of the Danish Sound Dues. For the following text, see in particular the following sources: "Aflosningen af Sund- och Belttolden. Aktstykker trykte som Manuskript for Medlemmerne of Rigsraadet og meddelte med Udenrigsministerns tillaadelse.", *Historisk Tidsskrift 3:1*, (1858-1859), pp. 455-558; Marcus Rubin, "Sundtoldens Aflosning", *Historisk Tidsskrift* 7:6, (1905-1906), pp. 172-311; Henning Henningsen, *Skippere, Klarerere och Toldere*, (1970); *Suomen Taloushistoria III (Historiallinen tilasto)*, (1983); B.R. Mitchell, *European Historical Statistics 1750-1970*, Abridged Edition, (1978); Feddersen, *Danmark og Nordamerika om/resund*, (1856); *Letters on the Sound-Dues Question*, (1855); C.E. Hill, *The Danish Sound Dues and the Command of the Baltic*, (1928).

[2] For the purpose of levying a duty for passage in the straits, Eric qualified the Sound and the Belts as parts of "Danish watercourses" ("courses de l'eau du royaume de Danemark"), thus asserting the sovereign's traditional right to impose duties on foreigners entering his realm. Cf. M. De Taube, "Le statut juridique de la mer Baltique jusqu'au debut du xixe siecle", 53 *Recueil des Cours* (1935 III), p. 487.

35. At first, the dues were paid by the owner or master of the ship itself; the cargo was not used as a ground for determining the duty. In the time of Christian I (1426-81), however, the dues were determined according to the weight of the cargo. At one period it was forbidden to sail through the Great Belt, but by 1560, the Danish authorities began to watch this channel as well, at the city of Nyborg. The dues collected there, however, never formed more than one or two per cent of the revenue from the castle of Kronborg at Elsinore, and the Sound remained the main source of income throughout the history of these customs. [1]

36. Some states were treated as privileged ones, while others were termed unprivileged, which naturally meant that for different countries there were varying grounds for determining the dues, much depending on the political situation of the day.[2]

37. Towards the beginning of the 17th century, the European sea powers, Britain, Holland and some others, began to show a marked interest in the Baltic. The reason was that the natural resources of many Baltic countries provided raw materials for the wooden sailing navies of the day. This connection between forests and sea power sent thousands of British and Dutch ships into the Baltic to fetch the goods their countries needed: timber, tar, pitch and hemp. At the close of the 18th century Dutch ships began to lose ground to their competitors and British ships began to dominate the Sound.

38. The unpopularity of the Sound dues increased steadily in the nineteenth century. During the 427 years of their existence the dues had never been very popular but the protests had been previously more subdued than they became during the last half-century which preceded the Treaty which ended the dues.

39. On April 14th, 1855 the U.S. Ambassador to Copenhagen, Henry Bedinger, was instructed to send a note to the Danish Government, informing it that from the 14th of April, 1856 onwards the Americans were not going to pay any further dues for their ships or cargoes passing the Danish Straits. This initiative, from a nation which was by no means the most important of the countries using the Sound for their merchant ships (the American ships did not even reach the number of 100 annually on the average), induced more international protests. Consequently the Danish Government drew up the outlines of a plan to put an end to the Sound dues and to provide suitable compensation to Denmark.

40. The first problem for the Danish Foreign Ministry was to determine the size of the compensation. Payments during the period of 1842-1853 were taken as a basis for this calculation.[3] There were several kinds of dues and fees paid during this period, the most important being the actual customs dues, which were paid for the transit of different commodities in the cargoes of the ships, and the lighthouse fees, which were paid by the ships irrespective of whether they were loaded or ballasted.

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[1] Smuggling was a great problem for the Danish authorities. It is impossible to estimate the amount of goods transported through the Sound without proper declaration, but duty evasion seems to have gone on all the time. To counteract this, the Danes stipulated that 4 per cent of the duty paid was to go to the master of the ship, while the remainder, of course, went into Danish cashboxes. This stipulation had the effect that the captain had an interest in seeing to it that the complete cargo was declared properly.

[2] At the Peace of Stettin (1570) Sweden and its provinces were liberated from the Sound dues altogether.

[3] Later, it was decided to leave the period of 1848-1850 outside the basis of calculation, on the grounds that the political and economic balance of Europe was disturbed in those particular years, owing to the wars and revolutions taking place then, thus affecting the amount of dues flowing in.

41. In October 1855 the Danish Government then sent notes to the Governments of the countries involved in the traffic through the straits. These notes contained the Danish proposal to end the dues in return for the payment of a capital sum to Denmark, and an invitation to an international conference in Copenhagen.

42. The proposed total sum, capitalized over 25 years and with 4 per cent interest added, amounted to 56.2 million Danish Dollars. However, it was impossible to persuade the countries involved to raise a sum of that size. After extensive deliberations in several meetings that lasted over a year, the sum was lowered to 35.0 million Danish Dollars, which sum constituted the basis for the calculation of the shares of the different nations. Each country had to pay its share in instalments over a period of twenty years. On this basis, the Treaty on the Redemption of the Sound Dues was signed on 14 March 1857. Ratifications were exchanged on 30 March 1857.

TABLE 1: THE CALCULATION OF THE SHARES OF THE VARIOUS COUNTRIES
(See opposite page.)

43. The Sound dues have been very widely discussed in legal literature. The prevailing opinion is that by the time of their abolition in 1857, they were already somewhat of an anachronism. The law of the sea had by then developed in the direction of providing for free passage in international straits, or at least of casting serious doubt on the coastal State's right to exact duties from ships or goods passing through such straits. The situation is perhaps best summarized by Brüel:

> "le traité en question fait une application positive, en ce qui concerne le passage des détroits danois, en temps de paix, des règles générales du droit international sur le passage des détroits internationaux en temps de paix, c'est à dire: Droit de passage inoffensif des navires de commerce par les eaux territoriales...".[1]

B. THE REJECTION OF ATTEMPTS AT DOMINIUM MARIS BALTICI

44. In addition to the Danish attempt to explain the Sound dues - and thus the straits regime - as a part of the Danish King's *dominium*, there were other aspects of straits passage that were directly related to views regarding the status of the Baltic.

45. Thus, there was a prohibition on foreign warships using the straits without the Danish King's permission. This lasted until 1658, when Denmark's Swedish provinces - among them the province of Scania, or the southern part of Sweden proper - were ceded to Sweden. By that fact, Denmark lost its former position as the sole coastal State able to control passage in the straits. In the *Treaty of Roskilde of 26 February 1658*, Denmark and Sweden decided upon joint control of passage by warships through the straits (Article III).[2] This joint control was put into effect during the wars of 1691-3.

46. The *Treaty of Nystad (Uusikaupunki) of 30 August 1721* put an end to Swedish dominance in the Baltic and started a period of Russian supremacy. Russia had the same interest as other dominant powers in the Baltic in barring outside naval powers from the Baltic. Hence, in a *Convention respecting the Baltic between Russia and Sweden of 9 March*

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[1] Erik Brüel, "Les détroits danois au point de vue du droit international", 36 *Revue Générale de Droit International Public (1929)*, p. 116.

[2] Cf. Parry, *Consolidated Treaty Series*, vol. 5, p. 30.

The Calculation of the Shares of the Various Countries in Paying the Compensation to the Danish Government in Accordance with the Treaty of the Abolition of the Sound Dues

	Countries	Average dues for goods traffic through the Sound 1851–1853						The percentages in col. 6 applied to the average goods dues in the Sound and the Belts 1842–47 and 1851–53	Lighthouse dues 1851–53 Percentages	The percentages in col. 8 applied to the average lighthouse fees 1842–47 and 1851–53	The figures in 7 and 9 added together and multiplied by 25	The figures of col. 10, reduced proportionately to lower their total to 35 000 000	The figures of col. 11 in percentages of the total	
		Imported to Baltic ports	Exported from Baltic ports	Exported to Baltic ports	Imported from Baltic ports	Col 1–4 put together								
		to or from countries below		To or from non-Baltic ports in countries below		Absolute figures	In percentages of total							
		Danish Dollars	Danish Dollars	Danish Dollars	Danish Dollars	Danish Dollars		Danish Dollars		Danish Dollars	Danish Dollars	Danish Dollars		
		1	2	3	4	5	6	7	8	9	10	11	12	
1	Denmark with colonies	115 000	3 900	2 524	2 250	123 674	2.94	61 892	6.90	10 396	1 802 200	1 122 078	3.21	1
2	Sweden	80 000	78 000	14 150	6 700	178 850	4.25	89 179	8.67	13 003	2 554 550	1 590 503	4.55	2
3	Russia	697 700	537 900	2 206	582	1238 388	29.44	617 752	5.33	7 995	15 643 675	9 739 993	27.83	3
4	Prussia	240 000	278 700	378	118	519 196	12.34	258 934	17.54	26 316	7 131 250	4 440 027	12.69	4
5	Mecklenburg	10 000	20 500	–	–	30 500	0,72	15 108	5.93	8 898	600 150	373 663	1,07	5
6	Lubeck	10 000	1 500	–	–	11 500	0.27	5 685	0.63	952	165 425	102 996	0.29	6
7	Baltic Sea in general	30 000	–	–	–	30 000	0.71	14 899	–	–	372 475	231 909	0.66	7
8	Norway	–	–	31 500	19 050	50 550	1,20	25 180	11.79	17 686	1 071 650	667 225	1.91	8
9	Hamburg	–	–	11 850	1 150	13 000	0.31	6 504	0.25	371	171 875	107 012	0.31	9
10	Bremen	–	–	19 150	8 150	27 300	0.65	13 640	0.27	403	351 075	218 585	0.62	10
11	Oldenborg	–	–	24	198	222	0.01	210	1.07	1 597	45 175	28 127	0.08	11
12	Hanover	–	–	40	1 876	1 916	0.05	1 049	4.58	6 878	198 175	123 387	0.35	12
13	Great Britain and Ireland with colonies	–	–	584 940	641 170	1 226 110	29.15	611 606	25.95	38 935	16 265 025	10 126 855	28.93	13
14	The Netherlands with colonies	–	–	77 826	78 548	156 374	3,72	78 057	8.27	12 404	2 261 525	1 408 060	4,02	14
15	Belgium	–	–	14 350	24 300	38 650	0.92	19 305	0.04	62	484 175	301 455	0.86	15
16	France with Algeria	–	–	86 800	64 908	151 708	3.61	75 750	1,71	2 565	1 957 875	1 219 003	3,48	16
17	Spain with colonies	–	–	127 554	3 774	131 328	3,12	65 468	0.05	63	1 638 275	1 020 016	2.91	17
18	Portugal with Madeira	–	–	24 602	10 532	35 134	0.84	17 626	0.02	30	441 400	274 823	0.79	18
19	Sardinia	–	–	2 612	426	3 038	0.07	1 489	–	4	36 825	22 928	0.07	19
20	Toscana	–	–	1 188	2 200	3 388	0.08	1 679	–	4	42 075	26 196	0.08	20
21	The Sicilies	–	–	28 226	334	28 560	0.68	14 269	0.30	444	367 825	229 013	0.65	21
22	Austria	–	–	2 764	1 228	3 992	0.09	1 889	–	2	47 275	29 434	0.08	22
23	Greece	–	–	178	–	178	–	88	–	2	2 250	1 401	–	23
24	Turkey	–	–	4 606	68	4 674	0.11	2 308	–	–	57 700	35 925	0.10	24
25	USA	–	–	64 650	25 650	90 300	2.15	45 114	0.67	1 003	1 152 925	717 829	2.05	25
26	Mexico	–	–	962	–	962	0.02	420	–	–	10 500	6 537	0.02	26
27	St. Domingo	–	–	1 482	–	1 482	0.04	839	–	–	20 975	13 059	0.04	27
28	Venezuela	–	–	736	–	736	0.02	420	–	–	10 500	6 537	0.02	28
29	New Granada	–	–	482	–	482	0.01	210	–	–	5 250	3 269	0.01	29
30	Uruguay	–	–	–	170	170	–	84	–	–	2 100	1 307	–	30
31	La Plata–states	–	–	–	268	268	0.01	210	–	–	5 250	3 269	0.01	31
32	Brazil	–	–	63 420	1 646	65 066	1,55	32 525	–	2	813 175	506 295	1,15	32
33	Peru	–	–	–	52	52	–	25	–	2	675	420	–	33
34	Buenos Ayres	–	–	–	–	–	–	–	–	1	25	16	–	34
35	Chile	–	–	–	48	48	–	23	–		575	358	–	35
36	China	–	–	474	–	474	0.01	210	–		5 250	3 269	0.01	36
37	Other, vaguely defined countries outside the Baltic	–	–	13 026	25 104	38 130	0.91	19 095	–		477 375	297 221	0.85	37
		1 182 700	920 500	1 182 700	920 500	4 206 400	100.00	2 098 561	100.00	150 018	56 214 475	35 000 000	100.00	

Source

Marcus Rubin: Sundtoldens Afløsning. **Historisk Tidsskrift 7:6. Copenhagen 1905–1906.** This table has been compiled on basis of the material, which was presented to the Conference on the Sound dues and has been printed in the **Historisk Tidsskrift 3:1 (Copenhagen 1858–59)** These documents in printed form were first presented to the members of the Danish Government.

1759 the two powers - while promising to protect commercial navigation of all countries into and within the Baltic - decided to take action to prevent the entry of foreign warships into the Baltic.[1] Denmark acceeded to this Convention on 17 March 1760.

47. The end of pretentions to close the Baltic came with the attempt to establish a *League of Armed Neutrality in 1780-3 and 1800.* The First League was established following a declaration by Empress Catharine II of Russia of 28 February 1780. It had do to mainly with a strict definition of contraband goods. Many powers accepted the declaration. Pursuant to it two Conventions were concluded with an identical content, one between Russia and Denmark, and the other between Russia and Sweden. The Netherlands later acceded to this "double convention". These two Conventions contained the principle that the Baltic "est une mer fermée, incontestablement telle par sa situation locale" (Article I).[2] In an attempt to isolate ("neutralize") the Baltic a *Danish-Swedish Convention of 27 March 1794* provided expressly that "La Baltique devant toujours être regardée comme une mer fermée et inaccesible à des vaisseaux armés des Parties en guerre éloignées", (Article 10).[3]

48. Catherine's son, Paul I, attempted to renew the League of Armed Neutrality in 1800 with a series of treaties concluded between Russia and Denmark-Norway, Sweden and Prussia.[4] After the Napoleonic wars and the bombardment of Copenhagen in 1807, however, it became clear that Denmark was not in a position alone to guarantee the closure of the straits to the navies of outside powers.

49. Attempts to close off the Baltic have always related to some Baltic nation's wish to keep belligerent warships away from its coasts. They have never amounted to an effective denial of the right of *commercial ships* to use the Baltic in the same way as any other part of world seas. During the 20th century, there has been no serious attempt to deny the international character of the Danish straits and the right of all countries, in time of peace, to send their commercial vessels through them on a perfectly equal footing.

50. The Danish straits regime was the subject of international deliberations at the *Versailles Peace Conference 1918-9.* The Versailles Peace Treaty limited Germany's right to erect fortifications close to the straits area. This was done, as was stated in Article 195 of the Treaty, "[i]n order to ensure free passage into the Baltic to all nations"[5]. Particularly interesting is the fact that the provision ascribes the free passage right to "all nations" and not simply to the states parties to the 1857 Copenhagen Treaty. As one commentator has observed:

> "..c'est ainsi que la liberté d'accès, base du statut juridique de la Baltique, a été posée au Traité de Versailles...'[6]

51. During the inter-war era, several codification attempts, based on Article 23 (e) of the League Covenant, were undertaken so as to enhance the freedom of navigation and

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[1] Parry, *Consolidated Treaty Series*, vol. 41, p. 285.

[2] Parry, *Consolidated Treaty Series*, vol. 47, p. 345.

[3] Parry, *Consolidated Treaty Series*, vol. 52, p. 191.

[4] Cf. Convention Between Russia and Sweden for the Re-Establishment of an Armed Neutrality, 4/16 December 1800. Denmark acceeded to it on 27 February 1801. The Russo-Danish Convention of 5/16 December 1800 and the Russo-Prussian Convention of 6/18 December 1800 have the same content. Cf. Parry, *Consolidated Treaty Series*, vol 55, p. 411.

[5] For text of Art. 195, cf. Annex 6

[6] Pusta, "Le statut juridique de la Mer Baltique à partir du XIXe siècle", 52 *Recueil des Cours* (1935 II), p. 159.

commerce. One example was the *Barcelona Convention and Statute on Freedom of Transit*, adopted on 20 April 1921. The Convention and Statute are applicable to all territories under the sovereignty or authority of States parties, and including their territorial waters. The parties agree to facilitate free transit of persons and goods in their territories. A reservation is made, however, regarding the customary conditions regarding transit in their territorial waters (Article 2). The Convention and Statute were ratified by Denmark on 27 October 1922 and their provisions were implemented by Danish decree No. 197 of 19 April 1923. (Lovtidende 1923 A II 1205.)

52. The position in the inter-war era is summarized by Brüel as follows:

> "...depuis la guerre, il se manifeste une tendance très nette à restreindre l'exercise des droits de l'Etat riverain neutre sur les passages qui ont une importance pour les communications internationales".[1]

53. In so far as the straits regime can be inferred from views regarding the status of the Baltic Sea, the occasional suggestions to restrict passage to the Baltic by ships of noncoastal States have only concerned warships and these suggestions have never amounted to a change in the legal status of the Baltic into a closed sea. In the following two sections the status of the straits is examined from the perspective of Danish law and regulations. Part III of the memorial will elaborate on the present international law applicable in the straits.

54. It may be appropriate to end this section by referring to the *Report from the Nordic Senior Officials Group assigned to Study the Prerequisites for a Nuclear-Weapon-Free Zone in the Nordic Area*[2]. This Report was prepared by high governmental officials from all the Nordic countries, including Finland and Denmark, and it was submitted to the Nordic Foreign Ministers at their meeting in Karlshamn, Sweden, on 22 March 1991. The Report notes that the Danish straits are "international straits" and that

> "...the Nordic countries' interpretations of the right of passage, as formulated in national regulations for straits, are in full agreement with the concept of 'innocent passage' in the 1958 Convention [on the Territorial Sea and the Contiguous Zone]". (Sect. 8.3.)

55. The open sea character of the Baltic and the international status of the straits is unambiguously recognized. The Report observes that the establishment of a nuclear-weapon-free zone (i.e. the closing of the Baltic from access by certain types of ships)

> "would require that nuclear-weapon powers approved the renunciation of their rights to 'innocent passage', as guaranteed by international law". (Sect. 8.3.)

It concludes that

> "Today, a large proportion of the Baltic Sea consists of international waters. A limited group of States - like the Nordic countries - cannot legally decide on its status in the same way as they can regarding their own land territories and internal waters. Furthermore, even in their territorial waters, the law of the sea would...not allow coastal states the right to prohibit nuclear weapons on board the vessels of foreign states which are making 'innocent passage'... circumstances concerning passage into the Baltic Sea cannot be regulated by coastal states irrespective of international law.". (Sect. 8.7.)

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[1] Erik Brüel, "Les détroits danois au point de vue de droit international", 55 *Recueil des Cours* (1936 I), p. 679.

[2] Annex 7.

Section II. Denmark's Territorial Sea

(See also *Map 5: Danish territorial waters*)

56. Denmark has a territorial sea of 3 nautical miles (5.556 Km). The baselines of its territorial sea are determined by Ordinance No. 437 of 21 December 1966[1] and Ordinance No. 189 of 19 April 1978 (containing minor modifications in the baseline). At its narrowest point, the Great Belt is enclosed within Denmark's territorial sea. The Little Belt is a part of Danish internal waters. The waters in the Sound are in part Danish territorial sea, but a part of internal waters reaches up to the line of delimitation established in the DanishSwedish Declaration of 30 January 1932[2]. Ships cannot pass the Sound on the Danish side of the international boundary without passing through Denmark's internal waters.

Section III. The Danish Straits Navigation Regime under Danish Law

57. The Treaty on the Redemption of the Sound Dues of 14 March 1857[3] abolished the payments due to the Danish King for ships and cargoes traversing the straits. As Oppenheim noted:

> "With these dues has disappeared the last witness of former times when free navigation on the sea was not universally recognised"[4]

58. In the 20th Century, Danish territorial waters regulations have always assumed free passage in the three straits. Two points are relevant in this connection:

a) Most of the regulations concern passage by warships. Though they are not directly relevant to passage by commercial vessels, they are still important in showing a kind of minimum right of passage in the straits based on general customary law. It is generally held that the 1857 Treaty did not cover passage of warships, but that this question is regulated by general customary law and the relevant Danish regulations. Because the intention of the 1857 Treaty was not to restrict but rather to liberalize passage rights, it can be inferred that whatever the rights which commercial vessels may enjoy under the 1857 Treaty, they must be at least as liberal as the basic standard governing warships.

b) The relevant regulations show that Danish law itself makes a legally significant distinction between "ordinary" Danish waters (territorial sea and internal waters) on the one hand and the "natural waterways" existing in the straits on the other hand.

59. Here is a rapid survey of the relevant Danish regulations:

1) *The Royal Decree of 20 December 1912* regarding Danish neutrality in time of war[5] established the main rule of free access for belligerent warships to Danish territorial waters. The King, however, reserved the right to prohibit their entry into Danish internal waters "in particular circumstances and for the protection of the sovereign rights of the Kingdom and the restitution of its neutrality" (Chapter I.1 (c)). "Internal waters", again, were defined as

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[1] Annex 8.

[2] Annex 9.

[3] Annex 10.

[4] L. Oppenheim, *International Law. A Treatise.*, vol. I Peace, 3rd ed. (ed. by F. Roxburgh), (1920), p. 350.

[5] Annex 11.

"ports, entrancies to ports, roadsteads, bays, territorial waters situated between and on the inside of islands, islets and reefs that are not permanently submerged". An exception to this definition of internal waters was made, however, in respect of that part of the Kattegat, the Sound, the Great Belt and the Little Belt "which forms a natural passage-way between the North Sea and the Baltic...".[1] The roadstead of Copenhagen (Hollaenderdyb and Drogden) was, however, exempted from free passage (Ch.I.1 (a)).

2) It was explicitly stated in Denmark's answer to the questionnaire prepared for the League of Nations' 1930 Conference on the Codification of International Law that Denmark recognized the international status of the straits and that the regime came under general customary law. Denmark explained that it was the purpose of the 1857 Treaty on the Sound Dues:

> "to bring these waters henceforward under the general rules of international law relating to straits connecting two portions of the open sea".[2]

3) *The Royal Decree of 31 May 1938* on Danish Neutrality Rules[3] followed closely the neutrality decree of 1912. It prohibited the entry of belligerent warships and submarines into Danish internal waters with the exception of that part of Danish waters in the straits which form the natural route for traffic ("voies de trafic naturelles") between the North Sea and the Baltic.[4] Again, access to the port and roadstead of Copenhagen remained prohibited (Article 2(1), 2 (2)in fine).

4) *Ordinance No. 356 of 25 July 1951* Respecting the Admission of Foreign Warships and Military Aircraft to Danish Territory in Time of Peace[5] contained both a definition of the Danish territorial sea and internal waters and regulations for the passage of foreign warships.

a) As far as the definition of internal waters ("inner territorial waters") was concerned (Article 3), an exception was made regarding the Sound and the Great Belt in which only ports, entries to ports, docks, bays and fjords plus certain specifically enumerated areas were regarded as internal waters. The main channels of the two straits (but not the Little Belt) were thus defined as territorial sea.

b) As regards passage by warships, the Ordinance established as the main rule that no advance notice of passage by foreign warships through Denmark's territorial sea was needed unless the duration of passage in Danish waters exeeded two whole days (Article 6). Internal waters were to be completely closed for foreign warships (Article 10).

A special provision concerned entry to the port areas of Frederikshavn, Elsinore and Copenhagen which required special permission - nevertheless, an advance notice sufficed if the warship intended only to pass through the Drogden or the Hollaenderdyb (Article 8).

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[1] "...dans la partie des eaux territoriales danoises du Kattegat, du Sund, du Grand et du Petit Belt, qui forme les voies de trafic naturelles entre la Mer du Nord et la Mer Baltique...", Règles de neutralité établies par ordonnance Royale du 20 décembre 1912. Martens, *Nouveau Recueil Général* 3ème séries, Tôme 7, p. 90.

[2] Annex 12.

[3] Annex 13.

[4] Annex13. See also law No. 297 of 1 September 1939 Prohibiting Entry of Belligerent Warships into Danish Harbours or Territorial Waters which established, in accordance with Art. 2, sec. 4 of the former Ordinance, certain areas in which the entry of belligerent ships was forbidden. Straits passage, however, remained unaffected. For English text, cf. UN Legislative Series, Laws and Regulations on the Regime of the Territorial Sea, ST/LEG/SER.B/6, p. 372.

[5] Annex 14.

5) *Ordinance No. 437 of 21 December 1966* (amended by Ordinance No. 189 of 19 April 1978) Governing the Delimitation of the Territorial Sea is silent on passage rights. It contains the normal distinction between the territorial sea (sometimes also called "external territorial waters") and internal waters. The main channel in the Great Belt and parts of the Sound are defined as part of the territorial sea. There is nothing to indicate that free passage would not be applicable in these sea areas. An interesting provision concerns internal waters. Article 3 of the Ordinance provides that this (i.e. the fact that a part of the sea is a part of internal waters) "shall involve no restrictions in the existing right of passage for foreign vessels through those parts of the the internal waters in the Samsø Belt, the Little Belt, the Great Belt, and the Sound, which are normally used for such passage".[1]

6) The present rules on the passage of foreign warships are contained in *Ordinance No. 73 (1976)* Governing the Admission of Foreign Warships and Military Aircraft to Danish Territory in Time of Peace[2]. Foreign warships "shall enjoy the right of passage through the territorial sea subject to advance notification being given through diplomatic channels...". In regard to the Great Belt, Samsø Belt and the Sound, however, notification shall *not* be required except in the case of simultaneous passage of more than three warships of the same nationality (Article 3). For passage through internal waters, advance permission is required, except, *inter alia*, for passage through Hollaenderdybet/Drogden for which only advance notification applies (Article 4).

60. In other words, *the regime of straits is distinguished from the general regime of the Danish territorial sea*, and is subject to more liberal rights of passage. There is no requirement of advance notification for passage of warships through the straits as a general rule. Even where the parts of the strait are a part of internal waters the regime of navigation by warships is more favourable, not requiring advance permission, than in other parts of internal waters.

61. In *conclusion*, it may be noted that as far as passage by ships other than warships through the Great Belt is concerned, there are no special provisions in force. The fact that warships are given a more liberal treatment in the Great Belt than in those parts of Denmark's territorial sea not part of international straits shows that Denmark itself makes the relevant distinction. The straits possess a special status; a status enjoyed by ships of all nations.

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[1] The text uses the English translation in *UN Legislative Series, National Legislation and Treaties relating to the Territorial Sea, the Contiguous Zone, the Continental Shelf, the High Seas and to Fishing and Conservation of the Living Resources of the Sea*, ST/LEG/SER.B/15, pp. 71-76 which is also contained in Annex 8. Another translation of the same Ordinance is contained in the more recent UN Publication, *The Law of the Sea, Baselines: National Legislation with Illustrative Maps*, United Nations, New York 1989, p. 122 reproduced on p. 60 of the Finnish Application. The latter differs significantly from the former, however, and appears confused. It defines Denmark's territorial sea as "consisting of external and internal territorial waters". These expressions are not, however, used in the rest of the translation at all which speaks of "external territorial sea" and "internal territorial sea". A literal translation of the original Danish text would use the expressions "external territorial waters" and "internal territorial waters". As this distinction, however, does not convey any difference in respect to the internationally established distinction between "territorial sea" and "internal waters" as referred to in the 1958 Convention on the Territorial Sea and the Contiguous Zone, the former translation is preferable. Also, it corresponds more closely to the vocabulary used in the translation of the 1976 Ordinance Governing the Admission of Foreign Warships and Military Aircraft to Danish Territory in Time of Peace, published in UN Legislative Series, National Legislation and Treaties relating to the Law of the Sea, ST/LEG/SER.B/19, 13 June 1978 pp. 142-144 and provided to the UN by the Danish Ministry of Foreign Affairs in a Note Verbale of 11 October 1977 (Annex 15).

[2] Annex 15.

Section IV. The Great Belt is a Strait "Used for International Navigation"

62. In the *Corfu Channel* case, this Court characterized an international strait as a "strait used for international navigation between two parts of the high seas" (*ICJ Reports 1949* p. 28). Since then, academic commentary has distinguished between "functional" (use-related) and "geographical" criteria for the definition of an international strait. During the preparatory work for UNCLOS I, the International Law Commission discussed the question of the definition at some length. The debate concentrated sometimes on the functional, sometimes on the geographical part of the definition. The result, as is well known, became Article 16 (4) of the 1958 Convention on the Territorial Sea and the Contiguous Zone, which made reference to "straits which are used for international navigation between one part of the high seas and another part of the high seas, or the territorial sea of another State". To this definition the 1982 UN Convention on the Law of the Sea added a reference to the new conception of the exclusive economic zone (EEZ) and a number of geographical exceptions which, however, are of no consequence to this case (of more consequence is the exception in Article 35c, but that does not touch upon the question of the *definition*).

63. It is not necessary to take a definite stand on the legal status of the "functional" criterion. There can be no doubt that the Great Belt is an international strait, inasmuch as it is a very widely used passage-way.

64. With an annual number of ship passages through the Danish straits in excess of 130.000 [1], the Danish straits are the second most heavily navigated straits in the world - next only to the English Channel. The Great Belt is a strait used - and "normally" used - for international navigation between two parts of the high seas. Though the Sound may still have a larger traffic if measured in numbers of ships, the Great Belt has the larger traffic in terms of net tonnage.

65. The traffic in the Great Belt has been steadily increasing. Here are the tables regarding the number of North/South passages of ships of over 50 GRT in the Great Belt and the Sound during the years 1981-1984 (more recent data has not been available)[2] :

Year	The Great Belt	The Sound
1981	19816	25728
1982	18596	24588
1983	20238	26110
1984	19763	26098

Today, over 20.000 ships of over 50 GRT pass every year longitudinally through the Great Belt. Of these, over a thousand have been larger than 40.000 DWT. About 7 per cent of the ships have a navigating draught of over 10 metres. In other words, for a significant number of ships that pass through the Baltic Sea accesses the only available waterway is the Great Belt, the Sound being too shallow.

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[1] Uwe Jenisch, "Recent Law of the Sea Development in the Baltic Sea", 38 *Außenpolitik* (1987), p. 362.

[2] Farvandsdirektoratet 1985, *Farvandvæsenets trafikanalyse 1984*, p. 12.

Section V. Conclusion

66. Whether assessed by reference to history, Danish law or its actual use for international navigation, the Great Belt is an international strait. *Prima facie*, at least, there seems no reason to deny the application of general rules of passage in international straits in the Great Belt. Whether this is so and what qualifications might be needed to this conclusion will be further discussed in Part III.

CHAPTER III

THE SOUND IS NOT A RELEVANT ALTERNATIVE

67. It has been argued from the Danish side that the obstructions caused by the fixed link over the Great Belt can be compensated by directing traffic into the Sound (eg. statement by Ambassador Fergo, 2 July 1991). Whatever basis this reference to an alternative passage may have in law (and it is contended that it has none in the circumstances of the Great Belt), the argument is incorrect as a point of fact. The navigational conditions of the the Sound, the legal status of its main waterway (Drogden), and the plans to build a fixed link over it, make it a much less useful route into and from the Baltic than the Great Belt.

68. The combined environmental implications of the Great Belt project and the plan for a fixed link over the Sound have given rise to much concern in the two coastal States (Sweden and Denmark) as well as elsewhere in the Baltic region, including Finland. As discussions on those aspects of the two projects are continuing and information on the effects is still incomplete, Finland will refrain from taking this aspect of the matter up at this stage.[1]

Section I. The Depth of the Sound is only half of that of the Great Belt

69. The Sound is a relatively narrow and a very shallow waterway between Denmark and Sweden (cf. Map 4). Though its northern part is deep enough to accommodate passage by any existing ship, this is not the case in respect of the two available channels in its southern part, the Drogden on the Danish side and the Flintrännan on the Swedish side. The deeper of these is Drogden, which is situated between the Danish islands of Amager and Saltholm. Drogden is 290 metres wide and has a guaranteed mimimum depth of 7.7 metres.

70. Navigation in the Sound presents no particular difficulties in good weather. There are several navigational lights and the narrow parts of the strait are well buoyed. Nevertheless, the official draught of 7.7 metres in the Drogden is measured at mean water level and may be further reduced. The tidal variation is insignificant. But wind and currents may have a significant effect: "the water level is liable to considerable seasonal variations and may rise or fall as much as 7 feet (2,1 m) above or below the mean level".[2] Gales may also lower the water level 2 to 3 feet (0,6-0,9 metres) below mean water level.[3]

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[1] Cf, however, the Statement on the Influence of the Permanent Road Connections across the Danish Sounds on the Baltic Environment. Submitted by Finland. Baltic Marine Environment Protection Commission – Environment Committee (EC) – Second Meeting, Gdynia, Poland, 9–13 September 1991. EC 2/2/4. 4 September 1991. Annex 16.

[2] Commander H. Kennedy, *A Brief Geographical and Hydrographical Study of Straits Which Constitute Routes for International Traffic*, UN Doc. A/CONF.13/6 and Add.1, United Nations Conference on the Law of the Sea, Official Records Vol I: Preparatory Documents, Geneva 1958 p. 142. According to United States Defense Mapping Agency, *Sailing Directions (Planning Guide) For the North Sea and the Baltic Sea*, Pub. No. 190, 3rd ed., 1990, p. 124, water-level variations are as follows: *Variation caused by East/Westerly Wind* in The Sound: -2.9- plus 2.7 feet (-0.88-plus 0.82 m); *Extreme Water Levels in the Sound and Bælterne 1916-40*: The Sound max: plus 3,6-5,9 feet (1.10-1.80 m) min: minus 1,5-2,3 feet (0.46-0.70m).

[3] United States Defense mapping Agency, *Sailing Directions (Enroute) for the Baltic Sea (Southern Part)*, Pub. No. 194, 5th ed., 1989, p. 6.

71. There is a 130 km advantage in using the Sound instead of the Great Belt when navigating between the North Sea and the northern parts of the Baltic. When planning the route, however, in addition to economic and time factors other considerations are taken into account. These include the risk caused by traffic and seasonal or weather conditions.

72. The risks in the Sound are particularly evident during the winter months when currents, decreased visibility, lack of buoys and problems caused by ice must be taken into account. During normal winters ice covers even the southern parts of the Baltic. Ice is most widespread in February and March. While the Sound is then covered by an even ice surface, there is scattered drift ice in the Great Belt. Even thin ice may affect the steering of a ship with no or little ice strengthening. Due to the narrowness of the Sound, ice tends to pack - a fact which makes navigation still more difficult.

73. The route through Drogden has the additional disadvantage of passing by several large cities, including Copenhagen. Traffic is heavy and dangerous goods carried by large container vessels increase the risk of serious damage arising from collisions. Because of groundings and several near accidents several shipping companies have advised ships in excess of 3.000-4.000 DWT to use the Great Belt.

74. Drogden also passes by Kastrup airport. Aeroplanes fly in over the navigational route to land. Ships with a height in excess of 35 metres must notify flight control two hours before passing by Kastrup so as to avoid collisions.

A. UNDERKEEL CLEARANCE

75. The Danish-Finnish discussions on the "Drogden alternative" have been complicated by uncertainty regarding the necessary underkeel clearance (UKC) and thus the *effective draught* in the Drogden. The concept of the underkeel clearance is dealt with in more detail in *Annex 4*. The following points are relevant in this connection:

1) The draught of 7.7 metres is the measure of the *actually existing water column*. Unlike the case in some other countries (including Finland), no extra water can be added to the notified clearance of 7.7 m. The effective clearance, then, is calculated by subtracting the required UKC from the draught of 7.7 metres.

2) There are no compulsory international or national rules on the calculation of the UKC in the Baltic Sea accesses. In the final analysis, it will be for the master of a ship to determine what measure of clearance is needed, having regard to the precise circumstances of the particular voyage (e.g. the type of the ship, the speed, water-level conditions etc.). Nevertheless, some guidance is provided from both Danish and international sources.

3) The required UKC for Drogden may be measured in various ways. The Danish Government sometimes requires a two-metre UKC. Nothwithstanding the official 17 metre depth in the Great Belt, Danish Pilots have been instructed that "ships with a draft of more than 15 metres (49 ft.) under normal conditions will not be able to pass through the entrances of the Baltic Sea."[1] Two metres UKC is also implied in the relevant IMO Resolutions.[2] Applied to the Sound, this would mean that the Drogden has an effective depth of only 5.7 metres. On the other hand, some information suggests that in the Drogden the recommended UKC is only 0,4 metres - but even that would mean that in the eyes of the Danish maritime authorities 7.3 metres must be the maximum draught of vessels using it. This, however, is

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[1] United States Defense Mapping Agency, *Sailing Directions (Planning Guide) for the North Sea and the Baltic Sea*, Pub. No. 190, 3rd ed., 1990, p. 308.

[2] A.339 and A.620, cf. Annexes 3 and 5.

insufficient for the purposes of many of the ships which actually pass through the Danish straits.

4) The recommendations given by the PIANC (Permanent International Association of Navigation Congress)[1] for the UKC of large vessels would, when applied to the Sound, give an underkeel clearance of 0.9 m (15 per cent of the depth of the channel). The effective draught would then be 6.8 metres.

5) Some further guidance can be had from instructions given by coastal States in comparable straits. Recommendations for the English Channel and the Dover Strait list a UKC of 5.0 - 7.6 metres[2]. The recommended UKC for deep-draught vessels navigating through the Straits of Malacca and Singapore is "at least 3.5 metres".[3] Malaysia, Indonesia and Singapore have, however, recommended a UKC of 2.5-4.5 m for vessels passing those straits.[4]

6) In addition, special circumstances should be taken into account. According to the recommendation by Det Norske Veritas[5]:

> "Sufficient underkeel clearance should be ensured during tow. A minimum underkeel clearance of ten per cent of the maximum draught or 5 metres, whichever is larger, should be ensured plus a motion allowance considering roll, pitch, heave, wind, towing loads, etc. A smaller underkeel clearance may be acceptable upon evaluation of the extent and method of survey for the towing route."

In conclusion, it is contended that for towage purposes, underkeel clearance should be 5 m, while for other purposes, a 2 m clearance is sufficient. The effective draught of the Drogden is 5.7 m. Even if the PIANC recommendation is followed, a maximum draught of 6.8 m received is which is significantly less than the 15 m applicable in the Great Belt.

B. OTHER

76. The Drogden has been dredged several times during the present century. The possibility of further dredging has sometimes been discussed. To dredge it to the same depth as the Great Belt (17 metres) would be unrealistically expensive. A 45 km channel would have to be dredged, and the amount of dredged spoils would exceed 50 million cubic metres.

77. In any case, it is very unclear whether a further dredging of the Drogden would be an environmentally acceptable alternative. Much of the domestic and international discussion regarding the planned Danish-Swedish fixed link over the Sound has concentrated on the effects on the whole of Baltic of changing the physical conditions of the waterflow between the North Sea and the Baltic.

78. Account must also be taken of the fact that the planned project for a fixed link in the Sound is intended to include a tunnel under the Drogden. This would make dredging to a

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[1] Cf. Appendix 1 of Annex 4.

[2] United States Defense Mapping Agency, *Sailing Directions (Planning Guide) for the North Sea and the Baltic Sea, Pub.* No. 190, 3rd ed., 1990, p. 294.

[3] Annex 17.

[4] Koh, *Straits in International Navigation: Contemporary Issues*, (1982), p. 84.

[5] Veritas Marine Operations, *Standard for Insurance Warranty Surveys in Marine Operations, Recommended Practices*, RP2 Sea Transportation for Self Floating Towing, sec. 5.8.2.1., cf. Annex 4, Appendix 2.

depth in excess of 10 metres impossible, as that is the depth at which the roof of the tunnel is planned to be.

79. The other navigational route in the Sound passes east of Drogden, in the Flintrännan. This has a guaranteed depth of 7,1 metres. The current is stronger here than in the Drogden. Especially under southern currents, ships must take care not to collide with the fixed lighthouses at the sides of the route. The fact that the Drogden is indeed the principal alternative route to the Great Belt is manifested by existing use: out of the 20.000 vessels that pass through the Sound annually, about 87 per cent use Drogden.

80. Whatever plans there are for the use of the Sound, the depth of the Drogden will remain significantly less than that of the internationally recognized Route T traversing the Great Belt. Route T is also wider and easier to navigate than the 290-metre wide Drogden. It is therefore much more appropriate for large ships and transports - precisely the kinds of passages that the East Channel bridge would prevent, if completed.

81. As Brüel noted in 1936:

> "...ni la passe de Flinterende, qui dans sa partie la moins profonde n'a que 7 metres, ni le Drogden - dont la profondeur, qui autrefois ne dépassait pas 6 m 50, atteint aujourd'hui 8 mètres grâce à des travaux d'approfondissement effectués depuis la guerre -, ne sont praticables pour les grands navires. Ceux-ci doivent, par consequent, faire le détour par le Grand Belt..."[1]

Section II. The Drogden is Danish Internal Waters

82. The most significant *legal* difference between the Great Belt and the deepest passage of the Sound - the Drogden (a part of the roadstead of Copenhagen) - is that while the former is a part of Denmark's territorial sea, the latter is enclosed within Denmark's internal waters. Though Danish Ordinance No. 437 (1966) Governing the Delimitation of the Territorial Sea[2] provides that there is no restriction on the right of foreign ships to pass through those parts of the Danish straits which are internal waters and "which are normally used for such passage" (Article 3), the difference between the regimes remains considerable.

83. In Chapter II, section III above, it was pointed out that the various ordinances regarding the passage of warships always treated the roadstead of Copenhagen as a special case in which freedom of passage was more limited than in other parts of the straits area. Thus, according to Ordinance No. 73 (1976) Concerning the Admission of Foreign Warships and Military Aircraft in Danish Territory in Time of Peace[3], no advance notification is required when less than three warships of the same nationality pass through the Great Belt. Notification is, however, required in case of passage through Drogden (sect. 4 (2)).

84. From the perspective of international law, the main difference between the two channels is that while the right of passage in the Great Belt is also governed by general customary law regarding passage through international straits, passage rights in the Drogden, as a part of internal Danish waters, can arguably be said to derive only from local custom to which effect is given by the relevant Danish ordinances.

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[1] Erik Brüel, "Les détroits danois au point de vue de droit international", 55 *Recueil des Cours* (1936 I), p. 602.

[2] Annex 8.

[3] Annex 15.

Section III. The Proposed Fixed Link over the Sound

85. On 23 March 1991 Denmark and Sweden signed a Treaty Concerning a Fixed Link over the Sound[1]. The Governments thereby agreed on the construction and operation of a fixed rail and road link between Copenhagen, the Danish capital, and Malmö in Sweden.

86. Studies on fixed links between Denmark and Sweden have been in progress more or less continuously since the 1950s. In the summer of 1973 the Swedish and Danish Governments were in a position to sign a treaty concerning fixed links over the Sound. The treaty was, however, rejected by the Danish Parliament, primarily because of its connection with the controversial question of Copenhagen's airport being located on the island of Saltholm off Copenhagen.

87. In 1984 it was agreed that fresh talks between Sweden and Denmark on fixed links over the Sound should start without delay. A Commission set up by Sweden to engage in these talks was charged with drawing up, jointly with the corresponding Danish Commission, a draft treaty. However, no draft was presented, because no decision on a fixed link over the Great Belt, which was considered an important pre-condition by the Danish side, had been taken.

88. The talks were resumed in the late 1980s. The existing material was supplemented in certain respects. A joint draft for an inter-governmental treaty was prepared by mid-March 1991.

89. According to the Treaty, a fixed link over the Sound is planned to leave the Danish mainland at Kastrup and join the Swedish coast at Limhamn. From Kastrup the link would be led into an approximately 2-km submarine tunnel under the Drogden channel. The tunnel would be located in such a way that the depth of water in the shipping transit lane at mean water level could be increased from the present 7.7 metres to at least 10 metres across a width of 600 metres[2].

90. An artificial islet south-west of Saltholm would provide a site for the interchange between the tunnel and a low bridge.

91. In the waters on the Swedish side of the Sound there are two transit lanes, the Flintrännan and Trindelrännan channels. The fixed link would be built as a high bridge with a clearance of at least 50 metres over Flintrännan, the channel normally used by vessels not choosing the Drogden channel, and at least 32 metres over Trindelrännan. It is proposed that the transit lane in the Flintrännan channel, which is about 230 metres wide, would have a navigable width of at least 300 metres. The corresponding navigable width in the Trindelrännan channel would be at least 200 metres. The exact navigable widths, as well as the clearances needed, remain to be worked out in the subsequent planning stages.

92. The contracts for the building of the link over the Sound will be offered internationally for tender. The aim is to begin the construction in 1993. It would then be possible for the link to be opened for traffic by about the year 2000.

93. The fixed link over the Sound will be owned by the Swedish and Danish states, in equal shares, through national companies. The latter are to work together in a consortium, which is to own and be responsible for all activities relating to the link.

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[1] Annex 2.

[2] For illustration, cf. Annex 18.

Section IV. Conclusion

94. The Sound is not a relevant alternative for the Great Belt as an international passage for large ships. First, the depth of the Sound is insufficient. If the internationally recommended underkeel clearances are followed, the Drogden can be passed only by ships with a draught significantly less than 7 metres. Second, the legal status of the Drogden provides for more limited rights than are guaranteed for foreign ships in the Great Belt. Third, it is unclear whether the conditions of the Sound can be maintained if the proposed fixed link is built over it.

95. It is doubtful whether the mere presence of an alternative passage is sufficient as a justification to curtail the right of passage in an international strait[1]. In any case, it would not seem possible to replace a natural channel by an artificial one[2]. In short, if there were a feasible alternative to passage through the Great Belt, this case would never have been commenced.

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[1] *Corfu Channel, Merits, Judgment, ICJ Reports 1949*, p. 28.

[2] Cf. Max Sørensen, Statement of 29 January 1962 to the Great Belt Committee, Part II. See Annex 19.

CHAPTER IV

THE DEPENDENCE OF FINLAND ON THE CONDITIONS OF PASSAGE THROUGH THE GREAT BELT: AN HISTORICAL EXCURSUS

96. There is a socio-economic background to the Finnish claim regarding the right of passage in the Great Belt. About 90 per cent of Finnish exports and over 80 per cent of Finnish imports are transported by sea. Out of the total amounts transported in 1990 (52,5 million tons), 46 per cent passed through the Danish straits.

97. The proposed bridge over the East Channel of the Great Belt is intended to stay in place for at least a century, and probably for longer. Its blocking effect will extend far beyond today's economic interests and technological knowledge. A historical perspective on the development of the Finnish interest is thus compelled by the very subject itself. For the question is not, as Denmark has sometimes claimed, about a juxtaposition of an important Danish interest in the long-term development of its internal transport and traffic connections alongside the transitory interests of Finnish companies. At stake is an essential condition of Finland's foreign trade. Though the immediate consequences of the bridge plan would - as follows from the nature of the matter - indeed fall on Finnish private industry, the long-term consequences, though unforeseeable in detail, would clearly impinge on the very substructure of the Finnish economy.

98. To set this matter in perspective, this section will briefly review the history of Finland's role as a user of the Danish straits over a period approximately as long as the projected life-time of the bridge.

Section I. Finland and the Sound Dues

99. The abolition of the Sound dues was discussed in section B.I.I. above. Here the intention is to look at Finland's contribution to the straits traffic and to the Russian part of the compensation paid to Denmark.

100. The total number of ships passing through the straits grew steadily after the institution of the dues in 1429. While the annual number of ships transiting the straits in the 16th century was only about 300 and 1500 in 17th century, around 5000 ships passed through each year in the middle of the 18th century and over 10.000 at the beginning of the 19th century. In the 1840's the figure was about 20.000, and the highest number before the abolition of the dues in 1857 was 24.648 ships in 1853.

101. Compared to the number of ships under various other flags in the Sound, those under the Russian flag were not numerous. Their number varied between around 300 in 1830 to slightly over 750 towards the middle of the 19th century. But a remarkable fact was that of all the ships under Russian flag in the Baltic, very few actually originated in Russia proper. The proportion of Finnish-origined ships within the Russian total varied between 80 and 60 per cent, and of the remainder, most were ships from the Russian Baltic provinces of Estonia, Latvia and Lithuania. The ships originating in Russian Baltic ports were insignificantly few.[1]

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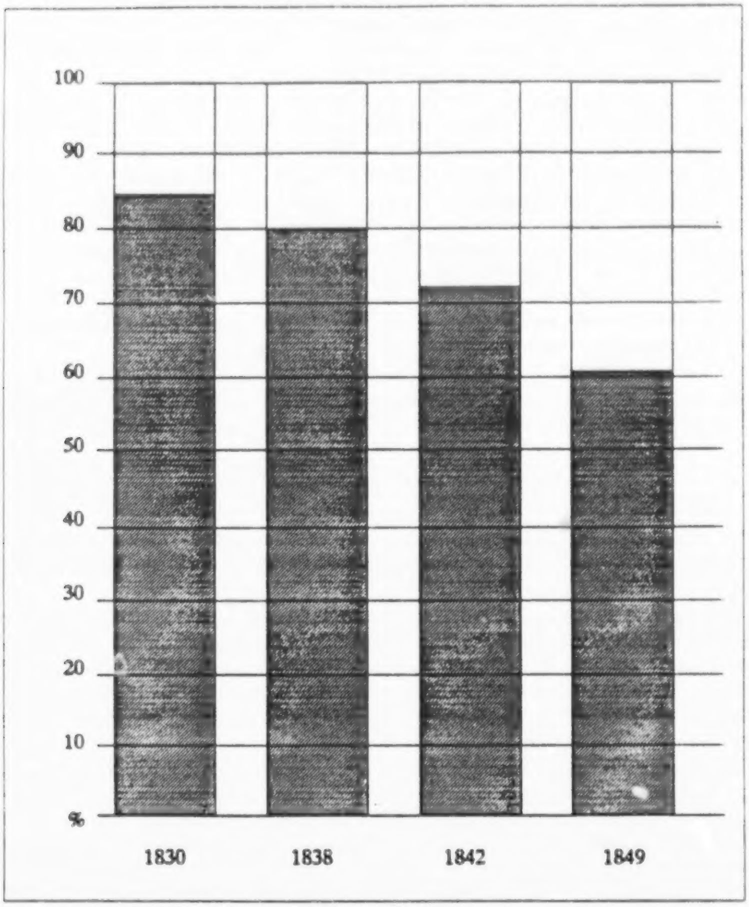
[1] It is possible to count the relative shares of the home ports of the ships by studying the meticulously kept books of the Danish customs authorities at the National Archives of Copenhagen. Each ship is given an individual entry in them, registering the port of loading, the port of destination, the home port, the name of the skipper, the composition of the cargo, the amount paid in customs dues and lighthouse fees and finally the date of passage.

TABLE 2: PERCENTAGE OF FINNISH MERCANT SHIPS IN THE SOUND COMPARED TO TOTAL NUMBER OF SHIPS UNDER RUSSIAN FLAG IN THE YEARS 1830, 1842 AND 1849.



102. The basis of the calculation of the compensation sum of 35 million Danish Dollars to Denmark has been discussed above (Chapter II, section I A). For Russia, the result of the Treaty of Copenhagen was that in exchange for the right of free passage through the Danish Straits the Russians had to pay 9.793 993 Danish Dollars (which equals 7 million Russian silver Roubles). This represented 27.83 per cent of the total compensation paid by the 15 countries which were signatories of the Treaty of Copenhagen.

103. Among the ships under the Russian flag, as was noted above, the percentage of Finnish ships and ships from Russia's Baltic provinces was very large. The Finnish maritime tradition, which had its roots in the period when Finland belonged to Sweden, was strong. This meant that after 1809, when Finland became a Russian Grand Duchy, Finns gradually achieved prominent positions within the Russian Empire in maritime affairs, both as captains of merchant ships and as naval officers. The situation changed somewhat during the last decades of the 19th century when large steamships became common in international traffic and Finland was unable to raise the capital needed to buy them.

104. In March 1858, Finnish authorities were notified that the Emperor had decided that the Finns were to contribute 400, 000 silver Roubles to the Russian component share (7 million silver Roubles) of the compensation for Denmark. This amounted to 5.71 per cent of the Russian contribution. Moreover, Finland would have to pay an additional 4 per cent interest on that sum. In 1859, on the 22nd January an Imperial decree was published, in which the Finns were ordered to institute a special import duty to finance the abolition of the Sound Dues[1]. This was to be collected in conjunction with the normal import duty. The Finns paid the revenue from this duty to the Russian Crown for twenty years.

105. The sums paid by Russia and Finland respectively, when calculated per capita in relation to the populations of the two countries, are in no proportion to each other. The Russian population in 1857 is estimated as 71.3 million, whereas the population of Finland was 1.7 million.[2] Thus, Finland paid 0.2 silver Roubles per capita, whereas the corresponding figure for Russia is only 0.09 silver Roubles. In other words, Finland was an important contributor to the Russian share of the compensation to be paid for Denmark for the redemption of the Sound dues and the establishment of free passage rights to all nations.

Section II. Finland's Dependence on Passage in the Danish Straits since 1857

106. Around the middle of the 19th century, when the Sound dues were abolished, Finland was a rather poor and peripheral country. But its economy was already in some degree integrated with the West European "core". From the early 17th century, Finland had been emerging as an important producer of "naval stores" such as "Stockholm" tar and timber, and the principal buyers of such products were found in the Netherlands, Great Britain, and later even in the Iberian Peninsula and the Western Mediterranean. On the other hand, Finland also depended on certain imported goods, above all salt, which came mainly from Southern Europe. All these were relatively cheap and bulky goods, the transport of which involved a high volume of tonnage. Thus, it was no wonder that during the early 19th century Finnish ships comprised the majority of vessels sailing under Russian flag from the Baltic.

107. During the "last golden days of sail", the vast majority of Finnish-owned tonnage was engaged in long-distance trading outside the Baltic and even between foreign ports. For example, both in 1853 and 1861, the reports from coastal towns indicate that no less than 80% of their total tonnage was away on voyages at the end of the year. Since winter-time navigation within the Baltic was very rare, practically all of the ships in question must have been sailing beyond the Danish straits. In fact, Finland then had probably three times more tonnage than was needed to carry its own exports and imports. The primary market for Finnish shipping lay in "blue-water" traffic outside the Baltic.[3]

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[1] Cf. Annex 20.

[2] Russian population statistics, B.R. Mitchell, *European Historical Statistics 1750-1970*, Abridged Edition, (New York 1978) p. 10, note 54. Finnish Population Statistics, *Suomen Taloushistoria III*, Table 1.3.

[3] Unless indicated otherwise, the description of shipping before 1914 is based on Kaukiainen, *Sailing into Twilight. Finnish Shipping in an Age of Transport revolution, 1860-1914*, (1991).

108. For Finland's shipping industry the four decades before the First World War War were far from happy. Merchant tonnage began to shrink and the tonnage of steam ships increased extremely slowly. By about 1913, steam ships only accounted for 24% of total Finnish seagoing tonnage - by far the lowest figure anywhere in Europe or North America. In spite of this decline, Finnish shipping continued to rely on long-distance trading. In 1912-13, for example, close to 75% of Finnish shipping income originated from transports which operated outside the Baltic waters.[1]

109. The period between the two World Wars saw the definitive transition from sail to steam. Because trade with postrevolutionary Russia almost stopped, Finland's trade and maritime contacts became even more oriented towards the west than they had been before. Great Britain became the most important destination of Finnish exports, with a share of over 40% (by value). This increased the relative importance of maritime transport. While about 70% of Finland's exports were carried in ships before 1914, this percentage rose to 95% after 1918[2] Of all ships cleared in Finnish ports with cargo, the following proportions had destinations beyond the Baltic:[3]

1920/21	71.4%
1929/30	77.1%
1937/38	71.4%

110. Finland's merchant tonnage suffered great losses during World War I. Consequently, during the early 1920s Finnish ships were able to transport less than a third of all Finnish exports and imports. After 1925, Finnish merchant tonnage grew fairly fast, and the share of sailing vessels shrank to less than a tenth of the total. Because of low manning costs, Finnish vessels were able to make a profit even during the years of low freight charges. Not only did they manage to increase their share of export and import transportation to 35-40%, but even their share of foreign cross-trading expanded.[4]

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[1] Thus, both Finland's foreign trade and shipping were extremely dependent on the passages between the Baltic and the North Sea. As typical ship sizes were still below 1,000 tons net, and vessels over 3,000 tons were rare, almost all of this traffic passed through the Sound (in those days, the typical draught of a fully loaded steamer of 3,000 net tons was 7–7.5 meters). Only in 1895 did a viable alternative appear, as the Kiel (or Kaiser Wilhelm) Canal was opened. Many Finnish liner steamships sailing to or from Belgium and the Netherlands began to pass the Canal, but for sailing vessels and tramp steamers carrying cheap bulk goods this was too expensive an alternative. Neither did liners destined from Finland to Hull use it regularly, since it shortened the voyage only by some 100 miles. A qualified guess would be that, just before the war, between a quarter and a fifth of all cargo between Finland and ports beyond the Baltic passed the Kiel Canal.

[2] Pohjanpalo, *Suomen kauppamerenkulku*, (Helsinki 1949), p. 108-113; Oksanen-Pihkala, *Suomen ulkomaankauppa 1917-1949. Kasvututkimuksia VI*, (1975), p. 22.

[3] *Finnish Official Statistics, ser. IB (shipping).*

[4] Ahvenainen-Kaukiainen-Viitaniemi, "Liikenne", *Suomen taloushistoria 2*, (1982), p. 280-283.

TABLE 3. PROPORTIONS OF FINNISH SHIPPING REGULARLY ENGAGED IN TRADING BEYOND THE STRAITS, 1920-1938:

Percentage of gross income accumulated by tonnage sailing beyond the Baltic, of corresponding total Finnish shipping income.

A = export and import shipping B = cross-trading

Time	A	B	ALL
1921/22	59	83	64
1929/30	70	85	74
1937/38	81	81	81

Source: Finnish Official Statistics, ser. IB (Shipping).

111. Table 3 reveals that the proportion of shipping income derived from traffic beyond the Baltic was slightly lower during the early 1920s than it had been just before the War. However, it rose steadily during the period, parallel with the growth of tonnage, and exceeded 80% before the Second World War. It seems that Finnish shipping concentrated on British and Atlantic trades more than ever before, and to an even greater extent than did Finnish foreign trade in other sectors.

112. Since the Second World War, Finnish trade relations have experienced a gradual change. The Soviet Union became one of its most important trade partners. Since an important share of this trade goes by rail, the development of maritime transport has not closely followed the growth of foreign trade. Other factors have contributed to the same effect. First, the physical volume of Finnish exports has grown more slowly than their value, because products of relatively high added-value have been substituted for cheap bulk exports. On the other hand, the import of crude oil has grown to such dimensions that the total volume of Finnish imports approached that of exports and actually surpassed it during the early 1960s. Thus, a fundamental change in the demand for shipping was brought about.

113. The growth of Finnish foreign trade was so fast (on average 6.3% a year between 1950 and 1985) that even the demand for maritime transport expanded vastly. From 1950 to 1985 the physical volume of Finnish seaborne exports and imports, expressed in tons, grew over fivefold, or on average at a rate of 4 . 8% per annum.[1] At the same time, however, the geographic distribution of Finnish foreign trade was changing. Crude oil shipments within the Baltic increased shipping movements between the Soviet Union and Finland; and the trade with another neighboring country, Sweden, has grown in importance. On the other hand, Britain has lost its former position; its share of Finnish exports has declined from about one quarter to one tenth, and its share of imports has been lower still. This change is also to be seen in the volume of shipments. In the mid-1950s only about a third of Finnish seaborne transports were confined within the Baltic, but this share grew to over 50% during the late 1980s. However, in actual volume, transports beyond the Danish straits have trebled. It must also be remembered that a substantial part of the huge growth in inter-Baltic shipping resulted from booming car-ferry traffic between Finland and Sweden.

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[1] *Sotakorvauksista vapaakauppaan. Kauppa- ja teollisuusministeriön satavuotisjuhlakirja*, (1988), s. 65-68, 122.

114. Table 4 shows that income from shipping beyond the Baltic, although increasing in actual figures (the Finnish merchant tonnage grew rapidly during the 1960s and 1970s), has declined in proportion to total freight revenue.

115. However, if only goods transports are taken into account, the decline is not so dramatic. In 1975, for example, almost 20% of all income originated in passenger traffic, which was then (and still is) confined to the Baltic area. Thus, almost 70% of income from goods transport was still earned in other than Baltic trades. It is true that there was a slight decline during the 1980s, when increasing amounts of crude oil were imported from Russia; but with the decline of Russian exports the trend has already been reversed.

TABLE 4: PROPORTIONS OF FINNISH SHIPPING REGULARLY ENGAGED IN TRADING BEYOND THE BALTIC, 1955-1975.

Percentage of gross income accumulated by tonnage sailing beyond the Sound, of corresponding total Finnish shipping income.

A = export and import shipping B = cross-trading

Time	A	B	ALL
1955	74	59	71
1965	60	62	60
1975	49	73	54

Source: Finnish Official Statistics, ser. IB (shipping).

116. For the period from the early 1980s onwards it is not meaningful to calculate similar percentages, because of the massive "flagging-out" of Finnish tonnage. This has occurred particularly in relation to tankers and dry bulk cargo ships, with the result that the proportion of passenger and other special cargo income has grown disproportionately as far as the tonnage still sailing under the Finnish flag is concerned. While it is an undeniable fact that Finnish shipping beyond the Baltic has grown more slowly than shipping east of the Danish straits, certain vital transports continue to rely totally on free passage through them.

117. During the last 50 years or so the general increase in ship sizes has forced an increasing number of ships to sail through the Great Belt instead of the Sound. Modern tankers and dry cargo vessels, and even larger ro-ro ships, have been diverted from their traditional passage past Copenhagen and Elsinore. No statistics reveal which fairways Finnish ships have been using when sailing from or to the Baltic, and this development can only be described indirectly.

TABLE 5: GROWTH OF SHIP SIZES IN FINNISH MERCHANT FLEET.

1 = Average gross tonnage (excluding ships under 100 GRT)
2 = Total tonnage (1,000 GRT) of ships over 10,000 GRT

Year	**1**	**2**
1950	1,224	1.0
1960	1,943	169.5
1970	3,077	761.9
1980	6,305	1,833.0

Source: Finnish Official Statistics, ser. IB (shipping).

The figure for 1980 represents a vessel which, when fully loaded, has a draught of about eight metres. On the other hand, ships of over 10,000 tons gross, which normally require a passage about 9 metres deep, represented over 50% of total Finnish tonnage by 1970 and, ten years later, their proportion was close to 80%. Although many ships which cannot pass the Sound were able to clear the Kiel Canal, many of them cannot use it because of its insufficient depth or air clearance or because reasons of economy. A substantial part of Finnish shipping moved from the Sound to the Great Belt during the 1960s and 1970s. With the continuing increase of ship sizes - dictated by the economics of scale (the need for increased cargo and passenger space) the prospect of a fixed limitation of 65 metres in ship height will become an externally imposed and arbitrary limitation to the development of Finland's trade relations.

CHAPTER V

A DESCRIPTION OF THE DANISH PLANS TO MODIFY THE NAVIGATIONAL CONDITIONS IN THE GREAT BELT

118. Over the years, several plans have emerged for the construction of a fixed link over the Great Belt. The social and economic importance of these plans is based on the fact that the Great Belt lies between two almost equal halves of Denmark. The traffic over the Great Belt has traditionally been organized by a very efficient ferry service.

Section I. Early Plans

119. Plans for connecting Sjaeland and Fyn have existed for a very long time .[1] In 1936 - a year after the Little Belt bridge was completed - a suggestion was made by the engineering firm Christiani & Nielsen/ Højgaard & Schultz and Kampsax to build a motorway over the Great Belt. The suggestion prompted the first official project planned by the DSB's (The Danish Railways) bridge office - the office that had been responsible for the administration of the Little Belt project. The project was suspended because of World War Two.

120. During the exceptionally cold "ice winter" of 1947 difficulties were caused for ferry traffic in the Great Belt. A Danish Governmental Commission was set up in 1948 (The Great Belt Commission) to study the possibilities of a fixed link over the strait.

121. The Commission issued a preliminary Report in 1956 and a final Report in December 1959 (Report 237/1960). Among the conclusions of the Report was a suggestion to build a bridge for both road and rail traffic from Halsskov Rev on Sjaeland, over Sprogø island, to Knudshoved on Fyn. The Commission had also considered the effect of the project on free passage in the Great Belt. In accordance with a statement by the then legal adviser to the Danish Foreign Ministry, Mr Max Sørensen, the Commission concluded that considerations of international law did not prevent the building of a fixed link as long as it allowed unhampered passage by all existing ships through the Great Belt.[2]

122. No final decisions were made at the governmental level at this time. Instead, a Working Group was set up in 1960 to carry out a series of exploratory drillings and other seismic and hydrological tests, as well as a new traffic analysis. A new report regarding the traffic in the neighbourhood of Copenhagen was published in 1961 by a committee of civil servants established by the Danish Ministry for Public Works. The Committee suggested, *inter alia*, that a bridge should be built over the Great Belt, to be brought into use by 1975.

123. In 1965-67 the Working Group organized an international design competition following a suggestion by the Danish Engineering Association. This aroused great interest, and 144 suggestions for tunnel and bridge alternatives were presented. Many suggestions contained a combined bridge-tunnel alternative.

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[1] For the history of the various projects, a useful source has been the final report of the Danish State Company Statsbroen Storebælt which was established to carry out the bridge project under law 414 of 13 June 1973 and was dismantled on the suspension of the project in 1978. Cf. *En Redegørelse for de af Statsbroen Store Bælt i medfør af lov nr. 414 af 13. juni 1973 om anlæg af broen over Store Bælt undforte forberedende arbejder 1977-1979.*

[2] Annex 19.

124. The Working Group's final report was published in 1968 (Report 508/1968). Relying heavily on economic considerations, the Working Group suggested the construction of a bridge with a combined two-track railway plus a six-lane motorway, all on one floor. The question of the implications of the plan for the right of free passage in the Great Belt was discussed and studies were carried out regarding the highest air draughts of existing ships. In a further paper, Max Sørensen reiterated his view that there would be no legal difficulty with the project to the extent that the navigational clearance took account of the highest ships then existing.[1] In his view the intervening 1958 UN Conference on the Law of the Sea had not brought a change in the navigational regime of the strait.

125. In 1970, however, a Technical Working Group (The Jespersen Group) was established to update the various technical and economic reports. Special consideration was to be given to a combined car-train alternative. In 1972 the Jespersen Group suggested that the most economical way to build the suggested fixed link was to construct a low bridge over the West Channel and a two-rail car-train tunnel under the East Channel.

126. Nevertheless, a *Law on the Great Belt Bridge* (414/1973) was enacted on 13 June 1973[2]. The Ministry of Public Works was commissioned to produce a concept consisting of two parts, a low level western bridge between Fyn and Sprogø and a high level bridge between Sprogø and Sjaeland. The law provided for a combined road and railway bridge with six lanes for motor traffic and two tracks for the railway. The Board of Directors for a State Company for the Great Belt bridge was elected (Styrelse for Statsbroen Store Bælt, SSB).

127. During 1973-1977 frequent parliamentary debates took place in Denmark regarding the feasibility of the suggested bridge. While some wished to suspend the project altogether, others had different views on the priorities between the different technical alternatives. The political atmosphere was so uncertain that it was not until January 1977 that the State Company (SSB) began functioning with a permanent staff.

128. This was also the occasion for the despatch of the Danish *Note Verbale* regarding the planned bridge to foreign Embassies in Copenhagen in May 1977[3]. According to the Note, the planned bridge was to have a height of 62 metres but "[t]he construction of the section across the eastern channel will, in conformity with International Law, allow international shipping between the Kattegat and the Baltic Sea to proceed as in the past". It was pointed out that construction works were "scheduled to begin in 1978 or 1979 and to go on for about eight years".

129. The notification produced reactions from the Soviet Union and Poland[4] both of which expressed their concern over the suggested clearance of 62 metres. As for Finland, no reaction was considered necessary, because of the express assurances regarding navigational rights and the very uncertain character of the domestic political consensus behind the project.

130. Meanwhile, parliamentary debates on the matter continued in Copenhagen. In March 1978 the SSB organized a meeting with the fourteen consortia that had qualified for the tendering process. On 16 March, the Parliament rejected yet another proposal by the "Venstre" and "Socialistisk Folkeparti" to suspend the bridge project altogether.

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[1] Annex 19.

[2] Annex 21.

[3] Annex 22.

[4] Annexes 23 and 24.

131. On 1 June 1978 the Parliament finally decided to reconsider the bridge decision at the initiative of the Venstre. Nevertheless, the SSB commenced tendering procedures.

132. The final suspension of the bridge project, as a result of the formation of a new governmental coalition - Venstre and the Social Democrats - was made public on 30 August 1978. The contracts that had been negotiated on the construction works were left unsigned and the tendering procedures were cancelled.

133. In September 1978, the Government made an official decision to end the bridge project. A governmental statement to this effect was made in the Parliament on 17 October 1978. All materials were sent to the archives. The Administration of the SSB was terminated. The project had been publicly and explicitly terminated with no date being set for reconsideration beyond an indication from the Minister of Public Works that he did not expect that the matter could be resumed for at least 4 to 5 years.

Section II. The Present Plan[1]

(See also *Figure 1*.)

134. Design work on a new Great Belt project started again in 1983. Nevertheless, as we have seen, by 1984 - when a draft treaty on the Sound was prepared - there was no decision in Denmark as to whether to proceed with a Great Belt link or not. A preliminary political agreement on the establishement of a fixed link was reached only on 12 June 1986. Meanwhile, existing ferry connections for railway and motorway traffic had been improved. In 1985-86 a motorway bridge was constructed on the island of Fyn to amalgamate railway and car ferry services. This bridge was never used for its original purpose and must be demolished to make room for the fixed link.

135. The political agreement of 12 June 1986 became the basis of *Act No. 380 of 10 June 1987* on the Construction of a Fixed Link across the Great Belt[2]. This law provided for either a high-level bridge or a tunnel across the East Channel. The contents of this law were communicated to foreign embassies in Copenhagen by the Circular Note of 30 June 1987[3]. The modalities of the present project differed significantly from the various earlier ones. Instead of a single bridge solution, the new Act provided for several alternatives to be made the object of further studies. Instead of a public body, a private company was engaged to carry out the project.

A. THE CONCEPTUAL DESIGN

136. The conceptual design was published in 1987 and 1988. The fixed link between Knudshoved in Fyn and Halsskov in Sjaeland was to be 18 kilometres long. It was to consist of three subprojects:

137. *The low-level West Bridge*. Combined railway and motorway bridge, alternatively two separate bridges for railway and motorway, were proposed for the West Channel. The

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[1] For a detailed description, cf. Annex 25.

[2] Annex 26.

[3] Annex 27.

bridge was to be 6100 metres long. The navigation clearance of the channel was set at 15 metres *(For illustration, see Figure 2.)*.

138. *The Eastern Railway Tunnel.* This sub-project was to consist of a double track railway tunnel between Sprogø and Sjaeland. The tunnel was to be either bored or immersed. The vertical alignment of the bored option places the tunnel deeper down. The roof of the tunnel was at a depth of 68 metres under sea level. The bored tunnel was to be 7900 metres long. The immersed tunnel was to be placed in a dredged trench. At the lowest point the roof of the immersed tunnel was to lie 40 metres under sea level. The immersed tunnel was to be 5600 metres long. In the immersed option, the tunnel was lengthened by partly submerged ramps in the seabed. The ramps were to be made of dredged material *(For illustration, see Figure 3)*.

139. *The Eastern Road Link - a bridge or a tunnel?* The law of 1987 provided for either a high-level bridge *or* a tunnel for the motorway to cross the Eastern Channel. The conceptual design report presented two bridge proposals and two immersed tunnel proposals.

140. The bridges studied were a cable-stayed bridge with a main span of 780 metres and a suspension bridge with a main span of 1416 metres. At both shores the bridges were connected to approach bridges by several 164 metre long spans. The total length of each alternative was about 5500 metres.

141. The tunnel alternatives were a concrete tunnel and a steel tunnel with identical longitudinal profiles. The tunnels were designed to be placed mainly in an excavated trench. At the deepest point however, a 150 metre long section of each tunnel was to be placed on an embankment. At the same point the roof of each tunnel was 40 metres under sea level. Each tunnel was 5300 metres long. However, the road was still under sea level at the end of the tunnel. Therefore, the tunnels would be lengthened by submerged ramps. The submerged ramps would be surrounded by artificial islands made from dredged material(For illustration of The East Bridge and The East Tunnel Proposals, see *Figures 4 and 5.*).

142. The official commentary to the law, prepared by the Ministry of Public Works, observed that between the two alternatives - bridge and tunnel - "there was no such difference from a functional, security or environmental point of view that would be decisive for the choice.[1] Indeed, it is nowhere made clear for what reasons or at what point in time the decision in favour of a bridge was made. According to the Agent of Denmark at the hearings on the request for the interim measures, the decision that only a high-level bridge should go out for tender was made by the Ministry of Transport in November 1988 .[2]

143. The ramps, the piers of the west and the east bridges, and the tunnels affect the flow of water. One requirement placed on the project by the Danish Parliament was that the total flow of water should remain unchanged in spite of the construction of the fixed link. In order to neutralize the effects of the structures it was decided to make compensating excavations in the channels. Some of the dredged material was to be used for land reclamation at Sprogø and Halsskov. The maximum seabed area to be dredged was 5 million square metres.

144. At the time of finalizing the conceptual design the following time schedules were presented: The railway link was to be opened in 1993, and the road link in 1996. For the western bridge this meant starting construction work at the end of 1988, and completing the

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[1] Lovforslag nr. L. 177/21.1.1987 (Forslag til Lov om anlæg af fast forbindelse over Storebælt), Bemærkninger til lovforslaget, *Folketingstidende 1986-1987, Tillæg A*, p. 3443-80, p. 3444: "Funktionelt, sikkerhedsmessigt og miljømessigt er det ikke mellem alternativerne højbro eller tunnel sadanne forskelle, at disse forhold kan være bestemmende for valget".

[2] Statement by the agent of Denmark, Mr. Magid, 2 July 1991.

railway bridge at the end of 1992 and the road bridge at the end of 1995. The railway tunnel work was planned to start at the end of 1988 and to be finished at the beginning of 1993. Construction work on the eastern road tunnel or bridge connection was to start at the end of 1991 and to be finished at the end of 1996.

145. Significant delays have, however, occurred, in particular due to difficulties with the tunnel construction. As the political agreement of 1986 provided that the railway connection should have a two- to four-year advantage over the motorway link, this means that delays in the finalization of the rail link will have immediate repercussions for completion of the motorway link. For the moment, the Storebælt company's own estimate is that the East bridge might be completed by the end of 1997 [1]

B. CONSTRUCTION[2]

146. A company, Storebælt A/S, was founded to run the project. The Danish state is the only shareholder in this company. The budget for the project was set at DKK 17.85 billion, at 1988 prices.

147. *The First Works in 1989*: Submissions of tenders for dredging and land reclamation were made at the beginning of 1989. Tender prices varied from DKK 1.1 to 1.4 billion. Dredging and land reclamation at Sprogø started in April 1989. Preparatory work had to be done for the bored tunnel and for the artificial island. The area of the original 40 hectare island was trebled. In October 1989 the new island was connected to the old one. The second phase consisted of constructing the ramps. The material used on Sprogø was 5 million cubic metres of sand and 1 million cubic metres of stone. Most of the material was acquired through dredging close to the island of Sprogø. However, some material had to dredged at Ramsø in the northern part of the Great Belt, outside the original working area. Later, material was also deposited at the site of two anchor blocks for the suspended bridge. Here ellipsoid artificial islands were built around the blocks to decrease the resistance of the water flow.

148. Extra dredging was later done to straighten the navigation route in the Eastern Channel. The handling of seabed material, in total about 14 million cubic metres, was finished in the summer of 1991. The dredging and depositing operations caused sedimentation in the area close to the site. At a distance of 15 kilometres sedimentation was measured to less than 2 millimetres. No serious impact on sea bed fauna was observed except that which occurred in the area nearest to Sprogø. Dredging and land filling caused losses to the fishing industry but an agreement with the fishermen's union on compensation of DKK 600,000 solved this problem.

149. *The West Bridge*. A contract for building the West bridge was signed in June 1989. Construction work started in August 1990. Only minor alterations were made in the tender design after tendering. The link comprises a railway bridge and a separate motorway bridge. The bridges consist of 63 concrete box girders, each with a span length of 110 metres. The total length of the bridge is 6900 metres. In the navigation channel the navigation clearance is 18 metres. From summer 1990 onwards no ships larger than 1,000 DWT were allowed to use the western channel. Later, when the bridge is completed, it will be decided whether to keep this restriction at the same level or to change it to 2,000 DWT. The costs of the western railway and motorway bridge are estimated at DKK 3.2 billion. No serious delays in this project have been reported so far.

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[1] *News from Storebælt No 10/91* (31 October 1991), p.7.

[2] See also Annex 28.

150. *The Railway Tunnel.* A contract for building the railway link between Sprogø and Sealand was signed in November 1988. The same year excavations started for ramps both on Halsskov and Sprogø. The boring of the railway tunnel started in August 1990. However, the boring machines did not operate as expected, and a delay of about one year is anticipated. In April 1991 only 820 metres of the tunnels had been bored. The costs of this project are estimated at DKK 3.3 billion. Construction risks such as, for example, unforeseeable subsoil conditions which might hinder and delay the boring operations, are not included in this price. Nor is installation of railway equipment included in this contract. A separate contract of DKK 1.4 billion covering all railway installations for the 18 kilometre fixed link, was signed in January 1989. On October 14, 1991, the two tunnel boring machines on Sprogø were flooded when water broke through the tunnels. For the moment, it is not possible to estimate the delays caused by that accident.

151. *The East Bridge.* The immersed tunnel option was abandoned in November 1988. It is not clear what were the main reasons for this. Apparently, ventilation in the tunnel would cause high service costs and would be technically demanding.

152. Calculations of accident probability and simulations of ship collisions were carried out as a part of the design of the East bridge. According to these studies risks for collisions could effectively be reduced by lengthening the main span. Since a stay-cable bridge can only have a maximum main span of 1000-1200 metres, the suspended bridge solution with a main span 1624 m long was selected. With the two side spans of 535 m the suspended bridge would be the largest bridge in Europe. The total length of the Eastern Bridge including the approach spans would be 6900 metres.

153. The conceptual design specified a navigational clearance of 77 m for the bridge (The Report of the Great Belt Commission of 1960 provided for a free sailing height of 67 metres[1]). The navigational clearance of 76-77 metres was also adopted in the the text of the Governmental proposal for the relevant law.[2] This probably reflected the fact that the study regarding mast heights, included in the Report of the Great Belt Commission of 1968 (508/1968), listed the height of 71.5 m for a Danish drillship.[3] Also, it appears that the Danish Ministry of Industry had noted in 1986 that vessels had been built with mastheads as high as up to 75 metres.

154. The Great Belt company was well aware that by 1989 there existed special vessels, including drillships with permanently installed derricks up to 75 metres high, crane vessels up to 90 metres high and jack-up barges with a height of 152 metres.[4] However, a special study was commissioned by the company from Det Norske Veritas[5]. This study concluded that excluding drill ships, jack-ups, semisubmersibles, crane ships and one VLCC, a bridge at the height of 65 metres would present no problems for existing ships. The ships excluded are, of course, precisely those whose right of passage is of greatest concern to Finland.

155. The company went on to observe that with a navigational clearance of 65 metres the East Bridge would be more energy efficient than a bridge of 77 metres. The bridge would be less steep, so that vehicles would use less fuel to pass over it. Consequently, sometime

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[1] Kommissionen angående en Storebæltsbro, *Endlig Betænkning (237/1960)*, p. 47.

[2] "Lovforslag nr. L. 177/21.1.1987 (Forslag til lov om anlæg af fast forbindelse over Storebælt), Bemærkninger til lovforslaget", *Folketingstidende 1986–1987, Tillæg A*, p. 3449–3450.

[3] *Fast Forbindelse over Store Bælt, Betænkning Nr 508 (1968), Bind II*, p. 6

[4] *News from Storebælt No. 6/89 (30 June 1989)*, p. 2.

[5] For the revision of that study, cf. Annex 10 to the Danish written observations of 28 June 1991.

during the summer of 1989, the decision was made by the Danish Ministry of Transport to lower the bridge height from the originally planned 76-77 metres to the present 65 metres.

156. Tenders for the East Bridge were received on 18 December 1990. Negotiations with contractors took place from June 1991, and the contracts for the East Bridge were signed on 22 October 1991, while the bilateral discussions between Finland and Denmark on a mutually acceptable technical solution, initiated in pursuance of this Court's Order of 29 July 1991, were still in progress.

Section III. Conclusion

157. The Great Belt fixed link that is the object of these proceedings originates in a law of 10 June 1987. That law provided for a bridge or a tunnel across the main navigable channel of the strait, the East Channel. The decision to opt for a bridge instead of a tunnel was made at an administrative level in November 1988. The decision to build a bridge was communicated to other countries in October 1989. Tenders for the East Bridge were received in December 1990 and the contracts were signed in October 1991.

158. It has sometimes been claimed on the Danish side that the works are so far advanced that no modification in the plans can be made. This is plainly incorrect. The rights of passage which Finland seeks to uphold would have been - and still can be - fully accommodated by opening the East Bridge at either of the side approaches to the suspension bridge. This is a minor modification which could easily have been made after the initial contacts with Finland in the summer of 1989, as the decision on whether to opt for a cable-stayed or a suspension bridge was not taken until March 1990. In fact, as we have seen, several modifications have already been made to the original conceptual design of 1988/9. The tender projects were not forwarded to prequalified contractors until April 1990. Even as the contracts were signed - on 22 October 1991 - a further modification was made, extending the approach spans by 25 metres - to 193 metres[1]. At the time of writing, no physical construction for the structure of the East Bridge has been undertaken. With the last minute extension of the approach spans there is now ample possibility for Denmark to modify the bridge plan so as to guarantee free passage through the Great Belt to all existing and reasonably foreseeable ships, including drill ships, semisubmersible drill rigs and jack-up drill barges.

159. Finally, it should be noted that other States have also expressed their concern at the effects of the present bridge plan to international navigation. Thus, the representative of the Soviet Union, for example, took the matter up at the 66th Session of the Council of the International Maritime Organization in June 1991, requesting that the Council "appeal to Denmark to make adjustments to its plans". The Council decided to take note of the concerns expressed but refrained from further action in view of the fact that this Court has been seized of the matter[2].

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[1] *News from Storebælt No. 10/91 (31 October 1991)*, p. 5.

[2] Cf. Annexes 29 and 30.

CHAPTER VI

THE EFFECTS OF THE FIXED LINK ON FREE PASSAGE

160. The planned East Bridge would close off access to or from the Baltic for ships and transports with a height of 65 metres or above and a draught in excess of that of the Drogden in the Sound (i.e. 7.7 m minus underkeel clearance). This has immediate effects on the ability of certain special vessels and large transports to move between the Baltic and the North Sea. Taking into account past trends in ship sizes, it may also be inferred that the bridge would obstruct the capacity of Baltic shipbuilders to participate in worldwide tenders regarding very large ships in the future.

Section I. Effects on the Passage of Offshore Craft

161. The most dramatic, immediate and complete obstruction threatened by the bridge project concerns free passage by craft used for offshore exploration and exploitation and related purposes. These craft almost invariably have a height in excess of 65 metres. Their passage through the Great Belt would become impossible if the East Bridge is completed as planned.

162. It is useful to start the survey of the effects of the fixed link on passage by offshore craft also because the problems experienced by them illustrate all the difficulties experienced by other types of present and future vessels. If the bridge construction is modified so as to allow passage by offshore craft, passage by all other conceivable types of ships would be able to continue unhampered.

A. TYPES AND DIMENSIONS OF OFFSHORE CRAFT

163. Structures used for offshore exploration, exploitation and related activities may be divided into fixed and mobile structures. Structures permanently fixed in the seabed (submersible platforms) are in essence towers built on the sea-bed. These platforms are not designed to be mobile. As such, they are much less flexible than mobile rigs. The ratio of submersibles to all offshore craft has during the past years been decreasing. By 1990, the submersible fleet had only 36 units, of which only about 25 per cent remained active.

164. Mobile offshore craft (also sometimes called "Mobile Offshore Drilling Units", "MODUs" for short) are usually classified in three types: drillships, semi-submersible drill rigs and jack-up rigs. These three types account for 617 (93 per cent) of the total of 662 offshore craft in use today. The rest are classifiable as submersible platforms and drilling barges.

165. Each type of offshore craft has its own typical area of use. Irrespective of the type, however, they all carry roughly similar drilling equipment. This usually includes a drilling tower, a derrick, the supporting structures for the derrick and drilling equipment, and the complex electrical, electronic, hydraulic and mechanical systems for the actual drilling function and accommodation for the crew.

166. Because of the standardized nature of the drilling equipment and operations, including the length of the drilling pipe which can conveniently be handled in the upright position, the structural height of a complete drilling system is very much the same on each of the different types of offshore craft. This height includes the derrick itself (about 52

metres) plus the substructure (about 10 metres) above the main deck level. To get the absolute air draft required by an offshore craft, the height of the main deck level from sea level has to be added to the above mentioned structural height of the drilling system. When transferring jack-ups and semisubmersibles over very long distances heavy lift ships are often used. This leads to higher air drafts than mentioned above.

167. Most floating production platforms, such as production ships and semisubmersibles, are designed to have a drilling facility with a derrick reaching an air draught of over 65 metres. In addition, all floating production platforms have a flare boom for burning the extra gas separated from the main flow. The flare boom is higher than 65 metres.

1. The Drill Ship

168. Drill ships are regular ships equipped with a drilling tower (derrick) and equipment. They are used especially for operations in remote areas because of their ability to move long distances under their own power[1] (for illustration, *see Figure 6*).

169. There are at present 36 drillships in use around the world. Twelve of these have been converted from ships used for other purposes. Three of the existing drill ships have been constructed in Finland - the *Valentin Shashin* (1981) the *Viktor Muravienko* (1982) and the *Mikhail Mirchnik* (1982). The usual height of a drill ship is around 80 metres, consisting of the hull plus a derrick. The draught of a drill ship is usually between 6.5 and 8.5 metres. A typical example would be the *Chancellorsville*, which was built in 1976. It has a draught of 21.2 feet (about 7 metres) at full load. The deepest water depth rated drill ship is the *Discoverer Seven Seas*, also built in 1976, whose draught is 24.9 feet (about 8 metres) .

170. The draughts of drill ships have not changed much over time. Nor is it expected that technical innovation will lead to a radical departure from present standards or dimensions.

171. None of the presently existing drill ships would be able to pass the Great Belt if the bridge were completed as planned.

2. The Semisubmersible

172. The semisubmersible is a floating craft whose hull is specifically designed for mobility. It usually has two pontoons (catamaran) and a deck supported by two to four columns. A majority of these have been designed by only four companies (Friede & Goldman 24 per cent, Aker 15 per cent, Earl & Wright Sedco 12 per cent and ODECO 10 per cent) (for illustration, *see Figure 7*).

173. The first semisubmersible offshore craft were delivered in 1963. There are presently 176 semisubmersibles in existence. The advantage of the semisubmersible over submersible platforms or jack-up rigs is its independence from the sea-bed and its great mobility. Most of the presently existing semisubmersibles are equipped by engins and propellers ("thrusters") to make them independently navigable.

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[1] Cf. generally Annex 31.

174. The derrick which stands on the deck usually has a height of about 40 metres. The air draught of a semisubmersible is between 76 and 90 metres[1].

175. The average transit draught of a semisubmersible is between 6 and 10 metres although some may have a draught of up to 16.5 metres (*Rowan Midland*, Petrolia). The transit draught of a semi-submersible is dependent on whether or not it is ballasted for towing. When in operation at a drilling site, the semisubmersible is ballasted to 25 metres for attaining a good stability. Over recent years, a slight increase in the transit draughts of semisubmersible craft can be discerned.

176. The early semisubmersibles were designed to work in around 200 metres of water. Today, many of them are able to drill in water depths of 600-700 meters and some as deep as 2000 metres. Semisubmersibles are often divided into three classes by reference to their weight and operational environment:

a) heavy semisubmersibles of up to 25.000 tonnes for use in harsh environments (Alaska, North Sea...);

b) compact semisubmersibles between 12.000 and 15.000 tonnes for use in relatively mild climatic and oceanic conditions (Gulf of Mexico);

c) light semisubmersibles of 6.000 tonnes upwards for use in specific, designated localities.

177. None of the presently existing semisubmersibles would be able to pass through the Great Belt if the East Bridge were completed as planned.

3. The Jack-Up

178. The jack-up rig is an offshore craft with a derrick and other drilling equipment on the deck supported by (usually three) legs which are lowered with a jacking system on to the sea bottom at the location of drilling operations. When the legs are lifted, the jack-up regains its floating position. The designs and capacities of jack-ups have developed markedly during the history of offshore activity. Today's rigs are much larger than the first jack-up rigs that were used in the 1960's (for illustration, see *Figure 8.*).

179. The world's jack-up fleet consists of 405 units. The advantage of a jack-up is that it is capable of being converted to serve other uses. It may, for example, be used for accommodation or the laying of pipe-lines in the seabed.

180. The air draught of a jack-up is a function of the length of its legs, which are lifted up as the craft is in transit. The average air draught ranges between 100 and 140 metres[2]. The required air draught may, however, also be significantly higher. The longest legs of a jack-up are about 200 metres (605 feet).

181. The transit draught of jack-ups is in the range of 13 to 30 feet (4 to 10 metres). The draughts have not varied very much during the years. The *Britannia* which was built in 1968 has a draught of 5 metres (15 feet), the *Ocean Tide*, delivered in 1971 has a draught of 5.8 metres (17 feet) while the *Rowan Gorilla*, built in 1984 has a draught of 5.7 metres (16.5

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[1] Annex 32.

[2] *Ibid.*

feet). Here is a table of some existing jack-ups which have an air draught higher than 65 m and a transit draught in excess of 7 metres. Spud cans are included in the transit draught:[1]

Name	**Design**	**Air draught [m]**	**Draught [m]**
West Beta	ETA EUROPE	150	8.5
Neddrill Trigon	CFEM	139.4	9.3
Trident X & XI	CFEM	122.2	9.6
Marlin	No. 6	116.4	8.5
KCA	Sandpiper	123.5	10.0
Diamond	M Gem	121.4	8.4

None of the existing jack-ups would be able to pass the Great Belt if the bridge were completed as planned.

B. THE MOVEMENT OF OFFSHORE CRAFT

1. Under their own propulsion

182. There are three basic ways in which offshore craft move on the sea. Drill ships move under their own propulsion like any other ships. So do many semisubmersibles, which have been equipped with thrusters under their pontoons that make them independently navigable. In case of long voyages, however, even semisubmersibles equipped by thrusters are usually towed in order to speed up the passage. Jack-ups are usually moved by towing. A third means of movement is carriage by heavylift transport ships. In the following paragraphs, more is said about these two latter means of movement.

2. Towage

183. The modalities of towage of a particular offshore craft are determined by reference to the size of the craft and the environmental conditions of the tow. These criteria determine the size and number of tugs to be used. The experienced company, Noble Denton Marine Services, requires that the towing vessel(s) should be capable of maintaining the position of the craft in 40 knot winds, 5m seas, and 1 knot current, all acting against the unit[2].

184. Traditional towage takes place with the craft floating on its own and perhaps assisting the tug(s) with its own propulsion (so-called "wet tow"). Sometimes, however, the semisubmersible or the jack-up is placed on a barge which is then connected to the towing vessel(s). Such a "dry tow" is a somewhat faster form of movement. The speed of a wet tow is approximately 4 to 6 knots, while the "dry tow" moves between 7.5 and 9 knots.

185. The barges used for dry tows of this kind do not usually have a navigating equipment of their own, though they may have small propellers to assist in maintaining direction under

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[1] Spud cans are structures at the bottom of the legs which distribute the leg weight over the soil once the legs are attached to the seabed.

[2] Cf. Annex 32.

tow. They can usually be ballasted for the purpose of attaching the craft to the barge or detaching it at the end of the tow (for illustration, see *Figure 9*).

3. Carriage by Semisubmersible Heavylift Transport Ships

186. Towage - wet or dry - is a relatively slow means of movement and involves a significant risk. Quite frequently, accidents occur under tow, sometimes resulting in a complete loss of the craft (for example, the *Rowan Gorilla I* in 1988, *Interocean II* in 1989 and the *West Gamma* in 1990).[1] Since the end of the 1970's, it has become possible to avoid some of the risk inherent in towage by using specially designed semisubmersible heavylift transport ships to carry the offshore craft to its operating location (for illustration, see *Figure 10*).

187. In addition to navigational safety, the advantage of these craft over traditional tows is their speed of movement, which makes possible an early commencement of the craft's operational actities on location. The additional revenue derived from this will in many cases offset the higher costs involved in using a heavylift ship instead of a traditional tow.

188. Currently, semisubmersibles tend to be towed very long distances unless the distance involved is quite exceptional. Jack-up rigs, on the other hand, are towed only for distances of up to about 1.000 miles; for longer voyages heavylift transport ships are used for reasons of speed, economy and safety (for illustration, see *Figure 11*).

189. A typical heavylift transport ship has an operating draught far in excess of 7 metres. They can thus pass the Danish straits only by using the Great Belt. If the bridge were constructed as planned, no heavylift ships could be used for the transport of offshore craft through the Baltic Sea accesses.

C. OFFSHORE CRAFT IN TRANSIT THROUGH TERRITORIAL WATERS AND INTERNATIONAL STRAITS

190. The movement of offhore craft through the territorial seas of third States and international straits is an everyday occurrence. According to one expert estimate, the number of such movements is in the range of 40-150 annually.[2] A recent report to the CMI relating to the Draft Convention on Offshore Mobile Craft noted "a very substantial increase in movements of drilling units throughout the world" and added that "[a] distinctive feature of the development has been the movement of drilling units between different continental shelves and over large geographical areas".[3] Most rig movements have been into the North Sea and West Africa from other areas of the world, particularly from the Gulf of Mexico and Southeast Asia[4].

191. When using the most common routes to their operational locations, offshore craft routinely pass through such international straits as the English Channel, Gibraltar, Magellan, Bab el-Mandab, Hormuz, Malacca, Sunda and Torres straits (Offshore Data Report, Annex 31.).

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[1] Cf. *Offshore Mobile Rig Accidents 1955–present*. Offshore Data Services 1991.

[2] Cf. Reply by Mr Ouwehand of 3 November 1991 in Annex 33.

[3] Comite Maritime International, *Draft Convention on Off - Shore Mobile Craft, Report and Questionnaire to the CMI Member Associations*, Frode Ringdal, Oslo, 24 September 1991, CMI Doc. Off-Shore-I, X-91, p. 2. See Annex 34.

[4] For the most commonly used routes, cf. Annex 31.

192. Data received from ***Bugsier Rederei- und Bergungsgesellschaft mbH*** - one of the largest international towage companies - concerning major tows of offshore craft performed by Bugsier tugs since 1965 confirms that international towage of offshore craft involving passage through international straits is a commonplace[1].

193. Experience shows that coastal States have not imposed particular conditions for allowing the passage of offshore craft through their territorial seas. To determine the level of control, two questionnaires were sent out from the Ministry for Foreign Affairs of Finland: one to three internationally renowned tug companies, the other to coastal States of important international straits[2].

194. The replies from the tug companies indicate that when planning routes, the most economic route is chosen. Sometimes territorial seas are avoided because of risk of collisions or groundings. There is no practice of routine notification to coastal states as a condition of passage. Prior approval seems necessary only for the Panama and Suez canals. Coastal States do, however, treat MODUs differently if their intention is other than mere passage (i.e. exploration or exploitation).

195. Replies have also been received from some coastal States. Those replies indicate that though there sometimes is a requirement of advance notice before a towage enters the territorial sea, the regulations regarding the passage of offshore craft - whether towed or under their own propulsion - do not differ from regulations regarding the passage of any other types of ships which are also commonly required to give advance notice of passage, for example in traffic separation schemes. In particular, there seem to exist no provisions or practice denying the right of innocent passage of offshore craft[3].

D. TRANSIT BY OFFSHORE CRAFT THROUGH THE DANISH STRAITS

196. Passage by offshore craft through the Great Belt would become impossible if the projected bridge were completed. All of these craft exceed a height of 65 metres. Inasmuch as the right of free passage applies to offshore craft, the completion of the bridge as presently designed would violate that right.

197. Though Denmark has not denied the fact that these craft have a height much in excess of the planned bridge, it has from time to time contended that their height is irrelevant as an accommodation can be made by modifying their passage in one of two ways:

1) it has been claimed that offshore structures might continue to pass through the Baltic Sea accesses by using the Sound (The Sound Option);

2) it has also been claimed that they could transit the Great Belt after having been dismantled for passage under the bridge, or simply by moving the final construction phase to a location beyond the bridge (The Dismantling Option).

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[1] Cf. Annex 35 - at least 80 passages.

[2] The Questionnaires, together with the replies received as of 1 December 1991 are listed in Annexes 33 and 36.

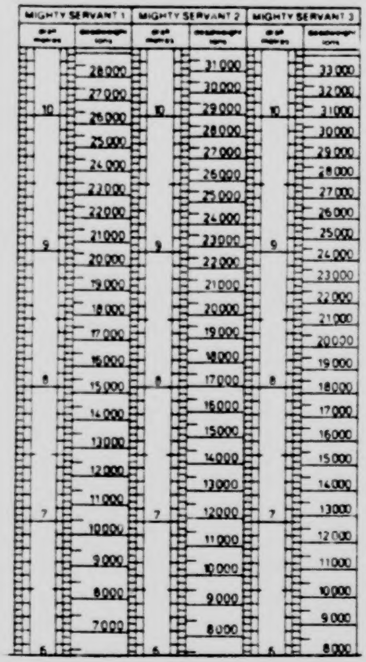
[3] Cf. also Annex 32.

1. The Sound Option

198. *Transit through the Sound is not a technically relevant option.* As noted in Chapter III, Section 1 above, the Sound has an official draught of 7.7 metres which is the actual physical depth of the Drogden channel at its shallowest point. This draught may, because of climatic or seasonal conditions, be reduced by as much as 2 metres. According to another estimate the waterlevel may decrease 0.40 to 0.70 metres.

199. We have seen that the typical transit draught of a semisubmersible is between 6 and 10 metres and that of a typical jack-up when towed between 4 and 10 metres. If carried on a heavylift transport ship, these transit draughts will increase significantly. According to data by Wijsmuller, the keel of a *"Mighty Servant"* type semisubmersible heavylift ship will descend to 8 metres with a 15.000 to 18.000 DWT load and to 10 metres at 26.000 to 31.000 DWT load.

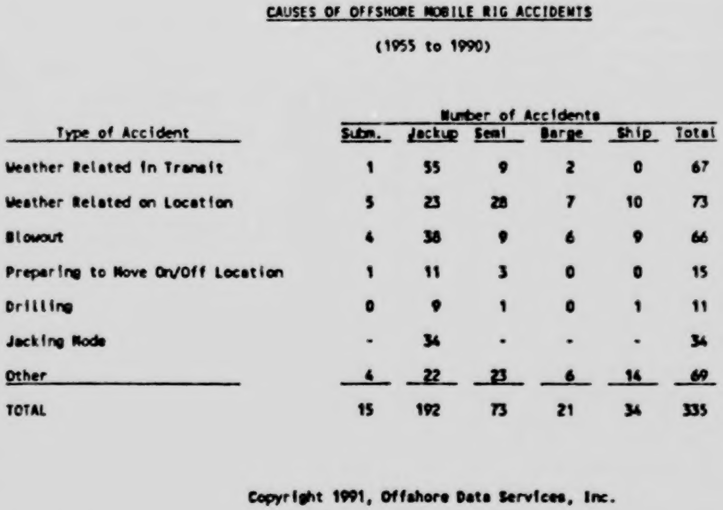
TABLE 6: DEADWEIGHT SCALES OF A MIGHTY SERVANT VESSEL:



Deadweight scales

200. Quite apart from the fact that this "option" is completely unavailable to most movements of offshore craft and to all movements by heavylift ships, it is questionable whether compelling towage as the only available mode of movement between the Baltic and the North Sea is a good idea in the first place. The movement of offshore craft is a hazardous activity. Of a total of 1.289 lives lost in 122 accidents offshore from 1964 to date, almost 700 lives were lost in connection with accidents during transportation (including accidents with helicopters). During the 10-year period 1980-9, there was a total of 39 towing accidents.[1] According to Offshore Data statistics, towage is about 20 times more dangerous than carriage by heavylift transport ship. By far the most important single source of accidents undergone by jack-ups during 1955-1991 is towage in rough weather.

TABLE 7: CAUSES OF OFFSHORE MOBILE RIG ACCIDENTS:



CAUSES OF OFFSHORE MOBILE RIG ACCIDENTS

(1955 to 1990)

Type of Accident	Number of Accidents					
	Subm.	Jackup	Semi	Barge	Ship	Total
Weather Related in Transit	1	55	9	2	0	67
Weather Related on Location	5	23	28	7	10	73
Blowout	4	38	9	6	9	66
Preparing to Move On/Off Location	1	11	3	0	0	15
Drilling	0	9	1	0	1	11
Jacking Mode	-	34	-	-	-	34
Other	4	22	23	6	14	69
TOTAL	15	192	73	21	34	335

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201. Because of its advantages from a safety point of view, underwriters and surveyors look favourably upon movement by heavylift transport ships in the insurance approval of such ventures[2]. Consequently, the costs of insurance for a movement by heavylift ship is considerably lower than the cost of movement by tow.

202. Moreover, the trend in the design of offshore craft has been towards units of a heavier structure and deeper draught. This can be seen, for example, in the list of craft tendered by Rauma-Repola Offshore since 1984. Those tenders concern structures many of which possess a draught of approximately 11 to 12 metres[3].

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[1] Annex 34.

[2] Cf. Annex 32.

[3] Cf. Table 16 at para. 263 below.

203. For these reasons and for the other reasons developed in Chapter III above, it may be concluded that the irrelevance of the Sound option is particularly evident in regard to offshore craft. For these craft, using the Sound is physically impossible. For other ships, it presents a danger far in excess of the hazards involved in using the Great Belt.

204. The question of the underkeel clearance has also been treated in Chapter III, para. 75 above and in Annex 4 and elsewhere[1]. Suffice it here to recapitulate the relevant points:

1) An underkeel clearance of as much as 5 metres may be required for towage[2];
2) Owners of offshore craft like to see at least 2 metres below the keel[3];
3) A minimum international standard of 0.9 metres is applicable for conventional ships.

205. The 2-metre UKC for offshore craft is not a theoretical abstraction. It may be supported by the fact that a wind of 50 knots - a generally used criterion in the design of offshore craft - causes an increase in draught of 1.7 metres for an *Ocean Ranger* type semisubmersible, type being built in Finland[4].

206. However one looks at these recommendations, it is clear that safe passage by an offshore craft can be ensured only by allowing for an underkeel clearance which corresponds closely to the Danish recommendation for the Great Belt (i.e. 2 metres), specifically meant for passage by heavy ships. As can be seen from the list of offshore craft built and tendered in Finland by Rauma-Repola Offshore, none of these craft could have passed the Drogden if allowance for the necessary 2 metres clearance is made (Annex 4). Even if the P.I.A.N.C. recommendation for ships of conventional size and design (15 per cent of the actual depth - i.e. 0.9 metres in the Drogden) is followed, the result is the same.

2 . *The Dismantling Option*

207. The Danish suggestion that offshore craft could be dismantled at sea so as to enable their passage under the Great Belt bridge is a curious "option". Surely it was never required that a ship, in order to be able to use the right of free passage should undergo an operation to change its shape and/or size ? Surely such a requirement cannot be easily reconsiled with any meaningful notion of "unhampered passage", and is more in the nature of a far-reaching *"détention ou entrave"* of the kind explicitly prohibited by the 1857 Copenhagen Treaty.

208. Much has been said about this "option" in the preliminary hearings on this case (Cf. e.g. pleading by Ambassador Fergo, 2 July 1991). Suffice it to note that such an operation would involve an excess cost and delay that would be incompatible with a normal meaning of unhampered passage[5]. The fact that such dismantling is sometimes done in internal waters (the Gulf of Maracaibo, Missisippi River) is hardly an argument for imposing it as a condition for passage through an *international strait*. Furthermore, cases of known disassembly concern only lightweight structures, do not involve harsh environments, heavy jack-ups or semisubmersibles, all of which are characteristic of the current pattern of actual international usage of the Danish straits.

209. According to a statement by Friede and Goldman Ltd[6], a large international company of naval architects and marine engineers and a leading designer of semisubmersible drill rigs

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[1] Annex 32.

[2] Annex 4, Appendix 2.

[3] Annex 32.

[4] Cf. also Table 16.

[5] Cf. Annexes 37, 38, 39, 40.

[6] Annex 41.

(and particularly of the kinds used in harsh environments) such a job would, in good weather, with sufficient manpower and with adequate handling equipment (cranes etc.) either on board the rig or a service vessel or dockside, *require from 5 to 7 weeks*. The job of dismantling the derrick of a semisubmersible would thus be "time-consuming and expensive in terms of direct cost and lost rig earnings". Consequently "MODU operators would do whatever it took to avoid such an operation if at all possible".

Section II. Effects on Passage by Other Types of Craft

210.Though the obstruction created by the Great Belt bridge is clearest on passage by offshore craft, it may be useful to look at its implications as regards passage by other kinds of craft, particularly certain types of special vessels.

A. VESSELS OF CONVENTIONAL DESIGN

211. Conventional commercial vessels can be further divided into "weight carriers" and "volume carriers". Weight carriers are designed to carry as much dead weight as possible. These include oil tankers, ore carriers etc. They tend to have as large a draught as possible. However, when the ship size increases, the air draught also increases. Air draughts of the order of 55 to 70 metres exist for Ultra Large Crude Oil Carriers (ULCC).[1]

212. Volume carriers are designed to have as large internal volume as possible. These include container vessels, RoRo ships, car carriers, passenger vessels etc. They tend to have as large a side height as possible. Recently-built large container vessels have an air draught in the range of 40 - 50 metres, large RoRo vessels in the range of 40 - 48 metres, and car carriers of about 40 metres.

1. Passenger Ships

213. At present, the only existing passenger ship with an air draught in excess of 65 metres is the *Club Med* sailing ship with a mast height of 68 metres. Nevertheless, there is no particular magic in the figure of 65 m. The height of the *Queen Mary* was 65.5 metres and of the *Queen Elizabeth* 63 metres. Modern passenger vessels are increasing their height as the need to take on board ever larger numbers of passengers grows.

214. An example of a large modern passenger vessel is the *M/V Fantasy*, built in Finland by Kværner Masa-Yards in 1990 (for illustration, see *Figure 12*).

215. The required clearance of the *M/V Fantasy* is about 56.3 metres. The water draught is 7.7 metres. The air draught and main dimensions for a number of existing passenger vessels and ferries[2], as a function of the year the vessels were delivered, is depicted in Table 8 given below. It can be seen that in the case of large passenger vessels there is a clear trend during the past decades to increase air draughts.

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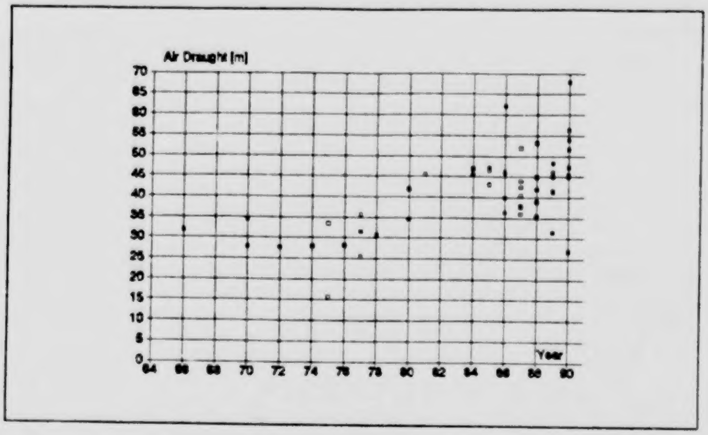
[1] Cf. Det Norske Veritas, *Revised Study on Air-Draught of Merchant Ships Carried Out for A.S. Storebæltsforbindelsen*, (10 March 1989). For text of the study see Annex 10 to the Danish Written Observations of 28 June 1991.

[2] Annex 42.

TABLE 8. AIR DRAUGHT FOR A NUMBER OF FERRIES AND PASSENGER VESSELS:



216. For reasons of energy, economics and navigational convenience, there has been renewed interest in the use of passenger sail vessels. There are several projects which have an air draught exceeding 65 metres. Mention has already been made of the existing sail ship, the *Club Med*, built by the Ateliers et Chantiers Reunis du Havre in 1990, which has an air draught of 68 metres (for illustration, see *Figure 13*).

217. The first large sail cruise vessel, the *Wind Star*, was built in France in 1986. This has an air draught of 62.2 metres. It has been succeeded by two similar vessels, the *Wind Song* in 1987 and *Wind Spirit* in 1988. The *Club Med* type sail vessels are a second generation of this type of ship and illustrate the tendency to increased vessel heights.

218. Sail or sail-assisted propulsion may be an attractive alternative in the future also for commercial vessels other than passenger ships, for example bulk carriers. This is a development which the presence of the projected bridge would hamper. For instance, a 30 000 DWT cargo vessel would need to have a 80 metre high rigging.

2. *Cargo Ships*

219. As far as cargo vessels are concerned, the Norske Veritas Study of 10 March 1989 commissioned by the StoreBælt Company[1], indicates that most - though not quite all - of such ships have an air draught of less than 65 metres.

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[1] Cf. Annex 10 to the Danish Written Observations of 28 June 1991.

220. However, it is difficult to present detailed and exact numbers regarding the air draughts of cargo ships used worldwide, as the various registries have not, as a matter of routine, listed the air draughts until recently, and even then only in a haphazard fashion. A computer print of 751 pages from Lloyd's Registry, for example, *listing all cargo and passenger ships registered by Lloyd's* and having a water draught in excess of 7.7 metres lists the height for only about every 10th vessel in the register. Generalizations regarding ship heights worldwide can thus only be made with some hesitation.

221. Taking these reservations into account, it may be noted that out of a total of 3.100 conventional cargo and passenger ships for which Lloyd's registers the height (about 10 per cent of the total), 137 had a height between 60.0 metres and 64.6 metres, 26 between 65 and 70 metres and 12 in excess of 70 metres. As Lloyd's lists only the total height, however, the calculation of the *air draught* must be derived by subtracting either the notified maximum draught, or, more realistically, the estimated Baltic draught (15 m), from the total height. This leaves a very small number for which the projected bridge might cause difficulties. The Norske Veritas study identified one type of large tanker with an air draught of 68 metres. Bearing these serious reservations in mind, and particularly the lack of readily available data on ship heights, it may be tentatively concluded that this may indeed represent the class of highest air draught for conventional cargo ship designs of which information is available. It is hardly an insignificant category, however.

3 . Very Large Crude Carriers (VLCCs)

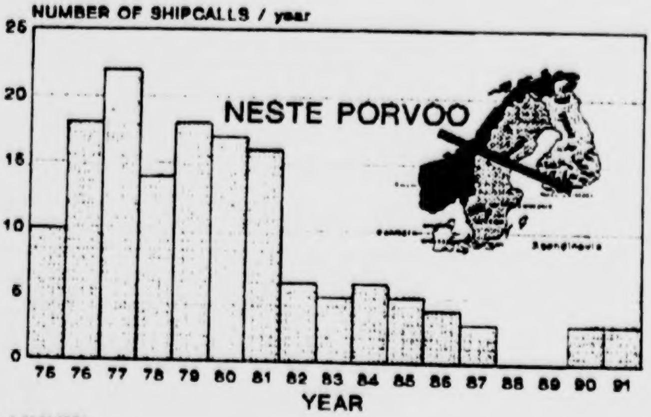
222. The Danish straits form an important international gateway for the energy movements of the countries around the Baltic Sea. In general crude oil and oil products move through the Great Belt while the generally smaller chemical and gas carriers make use of the Sound.

223. A great part of the crude oil and product movements to Finland have taken place inside the Baltic Sea. For example 80-90 per cent of the crude oil imported to Finland (7-8 bill.tons/a) has originated in the Soviet Union. Because of more stringent demands on sulphur content and production difficulties in the Soviet Union, a greater proportion will be imported from outside the Baltic from 1992 onwards. This will in practice mean year-round traffic through the Danish straits involving large crude oil carriers (over 100 000 DWT).

224. Neste Oy, the Finnish state owned oil and chemical company, is operating two oil refineries and petrochemical industries, which are the largest of their kind in the Nordic countries. The crude oil imports in the late 70s and early 80s were often transported from the Middle East by Very Large Crude Carriers (abt. 250 000 DWT) which were lightened in the North Sea onto vessels of about 100 000 DWT size to attain the Baltic draught of 15 m. Both ships, the VLCC and the 100,000 tonner, would then sail through the straits to Neste's Porvoo refinery.

225. Table 9 shows the number of ships over 150 000 DWT which have discharged their cargo at Porvoo Works annually from 1975 to 1991.

TABLE 9: NUMBER OF SHIPCALLS OVER 150 000 DWT AT NESTE OY PORVOO WORKS:



TTK / 11.11.1991

226. A notable change affecting the air draught of large oil carriers is currently under discussion in the International Maritime Organization (IMO), namely the obligation to use a double hull construction in order to reduce the risk of accidental pollution. The design requirements of future ULCC and VLCC will increase air draught for the following reasons:

- the double hull construction may increase the depth/beam ratio and result in a greater free board at ballast draught than a single hull construction.
- the IMO requirement of minimum forward visibility from the bridge will increase the necessary height of the superstructure.

227. The possibility cannot be excluded that the consequent increases in tanker height, together with an already used transportation method (i.e. "lightening" a VLCC into Baltic draught) becomes critical if the Great Belt bridge will have a clearance of 65 metres.

B. INDUSTRIAL AND SERVICE VESSELS

228. In addition to offshore craft, another type of industrial vessel which could not pass the Great Belt if the air draught were limited to 65 m is the *Petrojarl II* project requested by Golanor. This is a floating production vessel, which will be used for exploitation of marginal oil fields. The vessel will have an air draught of 90 metres (for illustration, see *Figures 14* and *15*).

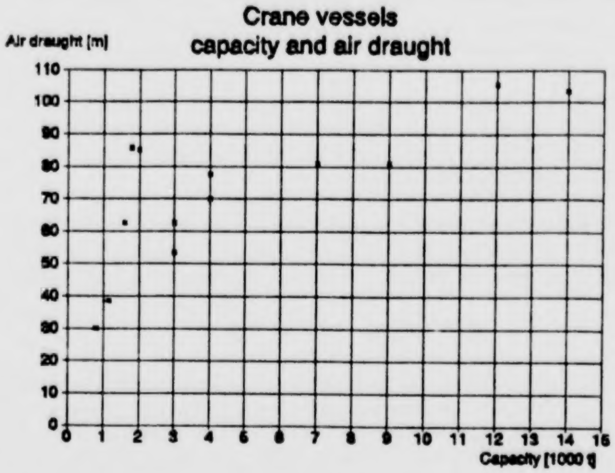
229. Also most large crane vessels with a hoisting capacity of 4.000 metric tons or more have an air draught in excess of 65 metres. A list of these vessels is given in Table 10.

TABLE 10. PRINCIPAL DIMENSIONS OF EXISTING CRANE VESSELS:

Name	Lifting capacity	Transit draught	Operating draught	Air draught
Challenger I	800 sht	7.32 m		30.0 m
Champion	1 150 sht	5.72 m		38.6 m
Tor	3 000 sht		11.5 m	53.5 m
Odin	3 000 sht	8.56 m	12.0 m	62.5 m
Stanislav Yudin	1 600 mt		5.5 m	62.6 m
ITM Challenger	4 000 mt	8.5 m		70.0 m
McDermott DB 50	4 000 mt		9.5 m	77.5 m
Balder	7 000 sht	11.0 m		81.0 m
Hermod	9 000 sht	11.0 m		81.0 m
McDermott DB 101	2 000 sht		7.5 m	85.0 m
McDermott DB 100	1 800 mt	8.3 m		85.7 m
Micoperi 7000	14 000 mt	10.5 m	27.5 m	103.5 m
McDermott DB 102	12 000 mt	13.2 m		105.5 m

The air draught of these vessels is plotted against their lifting capacity in Table 11.

TABLE 11. AIR DRAUGHT OF EXISTING CRANE VESSELS AS A FUNCTION OF LIFTING CAPACITY:



230. The exclusion of large crane vessels from the Baltic could have serious consequences. For example, it might prevent the carrying out of salvage operations in case a nuclear powered submarine weighing more than 4.000 tonnes is wrecked in the Baltic Sea. The prevention of the passage into the Baltic by the various types of offshore craft would also affect the future of offshore exploration and construction projects in the Baltic (cf. further section IV. B. below).

231. It is sometimes argued that a bridge at a height of 65 metres would present no practical hindrance for the passage of crane ships, as the crane can be easily dismantled in order to undertake the passage. Whatever significance such a claim might have as a point of law, it is an oversimplification as a matter of fact. If the upper part of the crane has to be dismantled for the bridge underpass, the following tasks and costs arise[1]:

- the crane has to be designed for easy dismantling, which will increase the crane price by about 2 per cent;
- after workshop tests, the derigging and dismantling of the crane, and rebuilding, rigging and reconnection of systems and testing after the bridge, the cost of passage is estimated to be about 2.5 Million USD, depending on the size and type of the crane;
- the dismantling-rebuilding period is estimated to be 4-5 weeks, which increases the cost of the whole vessel by 1-1.5 per cent.

C. FUTURE VESSELS

232. New vessel types, including floating hotels, towns and factories may well be introduced during the relevant time frame (i.e. 100-150 years - the projected period of the bridge's existence). One example of an on-going project already in the planning stage is the ocean going resort cruiser for 5000 passengers presently under active consideration at the Kværner Masa-Yards shipyard in Helsinki. The main particulars of such vessel are its draught of 11 metres and air draught of 70 metres[2]. Also other large vessels are under consideration[3].

233. To foresee the future development of ship sizes, it may be useful to look at certain aspects of ship building technology.

234. When determining the main dimensions of a ship to be built, the use to which the vessel will be put and, consequently, her type and size are the starting values. By the size of a vessel is meant her load-carrying capacity. In the case of a freight carrier, the unit used is usually a tonne; in the case of volume freights - such as liquid gases - a cubic metre. The size of a passenger vessel is expressed as the number of passengers she can carry or as a kind of volume unit, as gross tonnage.

235. After the determination of the use of the vessel, attention will be directed to its main dimensions: depth, height, draught, beam and air draught.[4] The decision concerning use will already have determined something of the dimensions. For example, in a ship where carrying volume is a major factor, the designers must make sure that the dimensions are large enough for the required volume. On the other hand, the dimensions are also dependent on each other.

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[1] Cf. also the picture in Annex 43.

[2] Annex 44.

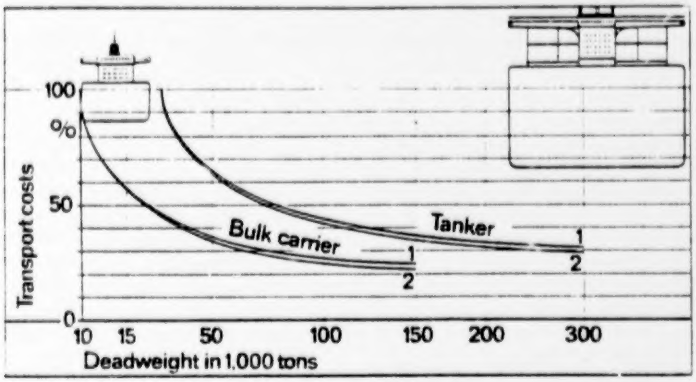
[3] Annex 45.

[4] Depth is the measure from the bottom to the uppermost hull deck. Deckhouses and superstructures rise from this deck upwards. Height is the measure from the bottom to the uppermost deckhouse or superstructure deck. The masts and funnels rise above this measure and determine the air draught of a vessel. Cf. illustration in Annex 46.

236. Thus, the air draught of a vessel is usually dependent on the depth and height. The bigger the depth of a vessel is, the bigger the height and consequently the bigger the air draught. When the capacity of a cargo vessel is considered, the depth is relevant, whereas when the capacity of a passenger vessel or a volume carrier is considered, the height is relevant.

237. In the determination of ship sizes, economics of scale are obviously relevant. A large vessel has a smaller unit cost per passenger or per cargo deadweight than a small one. It is therefore more economical than a small one.

TABLE 12. TRANSPORT COSTS PER TON OF CARGO AS A FUNCTION OF SHIP SIZE. 15 000 NM VOYAGE; 225 000 NM VOYAGE[1]:



238. A large vessel has also other advantages: it provides a more stable platform for human activities as can be seen in Table 13 below.

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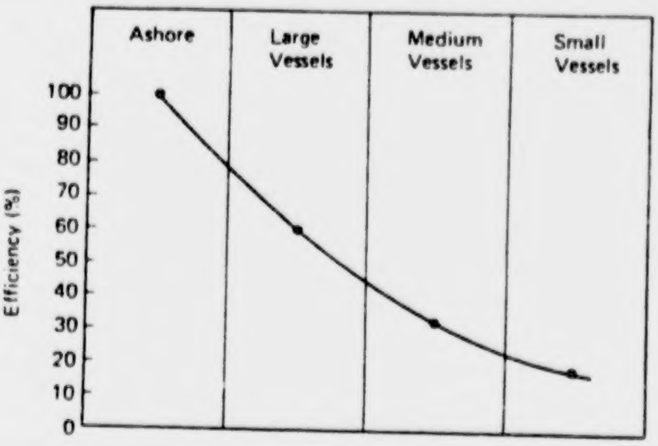
[1] Schönknecht R. et al., *Ships and Shipping of Tomorrow*, (1983), fig. 58.

TABLE 13. PERSONNEL EFFICIENCY IN A SEAWAY AS A FUNCTION OF SHIP SIZE[1]:



239. Any increase in ship size will usually show in an increase of the ship's draught. In other words, for economic reasons, the ship designer often endeavours to achieve maximum draught. If there are major limitations to the draught, due to sea-lane depths in the waters in which the ship is to sail, the limitation-determined draught is taken as the first main dimension.

240. Table 14 depicts the air draught of the vessels listed in Annex 42 as function of their draught. It can clearly be seen that air draught increases as draught does.

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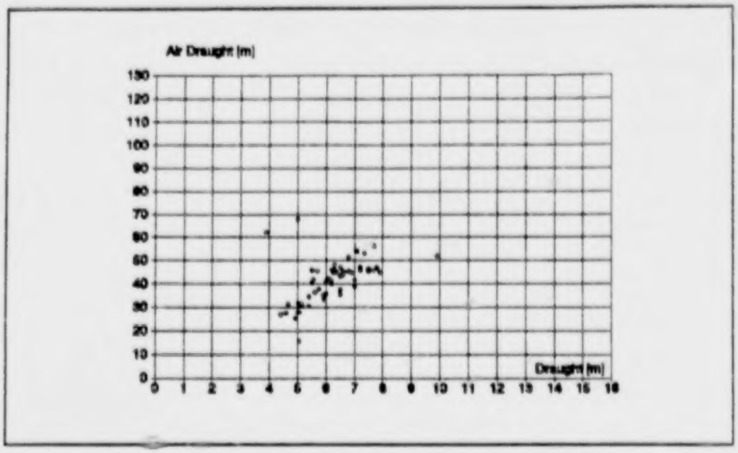
[1] Bhattacharyya R., *Dynamics of Marine Vehicles*, (1978), p. 498, fig. 16.47, p. 372.

TABLE 14. AIR DRAUGHT VERSUS DRAUGHT FOR PASSENGER VESSELS AND FERRIES GIVEN IN ANNEX 42:



241. Consequently, the table can also be used for extrapolating the main dimensions for a future big ocean going passenger vessel. Assume the draught of the vessel to be 15 m as that is a practical maximum draught for a Baltic vessel. The number 6.6 is chosen for the air draught/beam-ratio, which is a mean value for the existing large passenger vessels. From the table it can now be concluded that with a future increase of ship draught into the maximum allowable Baltic draught (15 m), ships might have an air draught of about 99 m and in any case much in excess of 65 m.[1]

Section III. The Effect on Finnish Shipbuilding

A. THE DEVELOPMENT OF FINNISH SHIPBUILDING IN THE POST-WAR ERA: TOWARD SPECIAL SHIPS

242. In relation to the size and industrial capacity of the country, Finland possesses a well developed and efficient shipbuilding industry. Its market share of world production (per cent of CGT) has in 1989 and 1990 been 3.3.

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[1] A more detailed discussion about the theoretical background for the choice of the main dimensions for a vessel is given in Annex 47.

243. The repercussions of the second World War were the driving force behind the development of the Finnish shipbuilding industry. The war reparations to the Soviet Union included more than 500 vessels, which required building up a substantial shipbuilding capacity. Since then, however, the industry's survival has been based on its competitiveness.

244. In the early 1960s the structure of ships ordered from Finland underwent a substantial change; the size of the vessels to be built grew and their number declined to a quarter of its former level. This required that Finnish shipbuilders come up with far-reaching decisions. Some of them transferred to new sectors while those who remained began to implement large-scale investments. Instead of building giant production facilities for super-size vessels - as happened in the leading shipbuilding countries - the Finnish yards concentrated on developing suitable types of their own. Highclass design and wide experience gained in building a highly diversified range of special vessels have since then formed the basis of the Finnish shipyards' success.

245. In the 1960s Finland rose to 15th place in the international shipbuilding league, with an approximate 2 per cent share of the world market. New vessel types such as car ferries and passenger liners, cruise vessels, cable layers, gas-turbine powered warships, large icebreakers etc. were added to the range of products. In collaboration with the University of Technology, a new national shipbuilding laboratory was established.

246. Since then, the Finnish shipbuilding industry has been producing the kind of tonnage for which demand would remain relatively constant regardless of cyclical fluctuations and which would ensure the existence of a regular group of customers. This has led to specialisation, with the Finnish yards prepared to supply even one-off orders. This is backed up not only by production equipment designed for flexibility, but also by exceptionally large production planning resources.

TABLE 15. SHIPBUILDING PRODUCTION IN 1976 - 1988 (MILL. FIM):

	1976	**1977**	**1978**	**1979**	**1980**	**1981**	**1982**
DOMESTIC	263.2	293.2	182.4	142.6	363.7	849.4	343.9
EXPORT	1.875.8	2.311.3	2.878.1	2.188.7	2,018.5	2,525.9	4.466.2
% OF THE TOTAL METAL AND ENGINEERING EXPORT	22.4	20.4	23.6	15.8	13.4	13.5	19.6

	1983	**1984**	**1985**	**1986**	**1987**	**1988**
DOMESTIC	100.0	927.4	1. 334.1	1.732 .1	833.6	210.0
EXPORT	5.816.1	6,624.9	4,756.3	3,955.0	2,224.9	3,592.3
% OF THE TOTAL METAL AND ENGINEERING EXPORT	23.3	23.1	15.9	12.4	6.8	9.8

247. In the course of the past 30 years, metal and engineering has grown into an export industry equalling the forest and paper sectors in volume, value and manpower. In 1960 the metal and engineering industries accounted for 15 % of Finnish exports, the forestry industries for 68 %. The corresponding figures for 1990 were: metal and engineering 44 % and forestry 39 %. Within the metal and engineering sector, the shipbuilding and offshore equipment industry has played a prominent role. In the 1980s the share of these subsectors of the total metal and engineering exports was over 20 % at its highest (24 % in 1983). The export figures do not include ships delivered to domestic buyers, such as icebreakers,

icestrengthened merchant vessels and state-of-the-art passenger ships. The relative decrease of the share of shipbuilding and offshore of the exports of the total of metal industries in 1985-7 reflects partly the increase in domestic demand, partly the increase of the production of metal industries generally.

248. In all countries, the domestic content of the shipbuilding and offshore industries is very high; in Finland it is over 80 %. An extensive subcontracting activity on this subsector has grown in the country. Some of the subcontractors have succeeded in establishing themselves on the international market as well.

249. A structural rationalization was successfully carried out within the Finnish shipbuilding industry at the beginning of the seventies. Smaller shipyards were merged with larger shipbuilding groups. Larger companies had better resources to modernize the viable shipyards than small independent companies would have had. During this period three completely new yards were started in Finland.

250. In 1973 the state-owned Valmet built a new shipyard outside Helsinki with a capacity to construct vessels of up to 250 000 DWT. Another shipyard was established in Turku by Wärtsilä (Now Kvæmer Masa-Yards) in 1975. In 1972 the Rauma Repola company constructed extensive engineering works on the Finnish west coast near the town of Pori. With the increasing demand for equipment for the offshore sector, this company has become a considerable producer of offshore craft.

251. The three new yards are among the most up-to-date facilities in western Europe. The following list shows the extremely diversified character of the products from Finnish yards:

ORDERS ON HAND WITH FINNISH SHIPYARDS IN 1983:

Type of vessel	**Number**	**GT**
River-sea vessel	2	3,800
Research vessel	3	2,400
Research vessel	1	1,800
Research vessel	5	1,650
Supply vessel	4	1,580
Tanker	1	5,000
Arctic tanker	5	5,500
Ro-ro vessel	1	8,400
Ro-ro vessel	2	5,000
Ocean going tug	3	1,500
Passenger vessel	2	2,050
Patrol vessel	1	130
Dry cargo vessel	4	17,910
Barge carrier	2	8,900
Accommodation vessel	4	4,465
Ferry boat	1	227
Icebreaker	6	1,800
Supply vessel	2	2,600
Passenger vessel	2	2,600
Luxury cruise vessel	1	40,000
Luxury cruise vessel	2	4,000
Car/passenger ferry	2	35,000
Dry cargo vessel	3	18,627
LPG-carrier	2	12,000
Dry cargo vessel	3	18,627

Multi-purpose vessel	3	31,000
Dredger	2	2,300
Heavy lift vessel	3	17,000
Product tanker	2	14,000
Dredger	2	2,500
Heavy lift vessel	1	24,000
Oil drilling rig	3	–
Oil drilling rig, jack up	2	–
Total	82	

B. LARGE PASSENGER AND CRUISE VESSELS

252. Kværner Masa-Yards Ltd. is a Finnish shipbuilding company owned by the Norwegian Kværner AS. With 4000 employees it has a capacity of 60,000 tonnes of steel per year and ranks as the largest shipbuilding company in Finland. Kværner Masa-Yards holds a substantial market share in cruise ships, which is one of the shipbuilding segments where West European yards are quite competitive. The Company's present products include some of the world's largest passenger vessels. Its future designs include ships with an air draught far in excess of 65 metres.

253. Since 1961, over 50 passenger ships have been delivered by this company and its predecessor, Wärtsilä Oy. An overview of these ships graphically shows the growing trend of the passenger ships built by the yard during the past thirty years[1]. The largest and newest cruise ferry is the *Silja Symphony*, with a draught of 6.4 m and air draught 53 m.

Mention has already been made of the cruiser M/V *Fantasy* which was delivered by this company in 1990 with an air draught of about 56.3 and water draught of 7.7 m.

254. The products of Kværner Masa-Yards Ltd. are the result of technological innovations, market needs, economical viability and business opportunities. In many cases, the company has become engaged in projects where development and adoption of new technology has been an integral part. Therefore, future orders cannot be reliably extrapolated from the present situation. Furthermore, when one tries to draw trends for the future, it must be kept in mind that individual ships can only be considered as examples in each market segment.

255. The company's shipbuilding facilities are located in Helsinki and Turku. Both shipyards have the capacity to construct vessels far in excess of the height of 65 metres. The *Turku New Shipyard* was completed in 1975 and further developed in the 1980s. Its large modules from the fabrication shops can be handled by the dock's 600 tonne capacity gantry crane, which has an overall lifting height of 85 m. [2] In the present *facilities in Helsinki*, the main assembly facility is a totally covered drydock, 208.5 m long * 34 m wide * 9.5 m deep. The Yard currently employs around 1300 persons. The Yard has gained experience in specialised vessels such as icebreakers, cruise ships, cable ships, naval craft.

256. The company is continuously involved in the development of future cruise liners and ferries, including faster ships, larger ships, floating self-propelled resorts, sailing ships and so-called "SWATH" ships[3]. The reason for the increased size of these ships is the economy of scale. Larger vessels can accommodate larger numbers of passengers.

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[1] Annex 48.

[2] These dimensions are pictured in Annex 49.

[3] Two designs for such vessels are depicted in Annex 50.

257. The development of multihull vessels presents an important shift towards increasing ship height. In a multihull ship stability is not endangered by a marked increase in height. The technical evolution is represented below (see illustration in *Figure 16*).

258. The multihull arrangement avoids an extremely long and narrow construction with unfavourable manoeuvrability and weak stability. It gives the vessel ample stability and manoeuvring characteristics, keeps the distances onboard within reasonable limits, while offering roomy indoor and outdoor public spaces and without overloading the longitudinal strength of the vessel.

C. INDUSTRIAL AND SERVICE VESSELS

259. In the future, the vast oil and gas resources on the Eurasian continental shelves in the Arctic ocean will become economically viable for exploitation. Large size icebreaking vessels, drilling equipment, support equipment and transport tonnage specially designed for that environment will then be constructed. Kværner Masa-Yards intends to participate in this development.

260. Several offshore supply ships, diving support ships, crane vessels, heavy transport ships have already been delivered. Noteworthy is the 1600 ton crane ship *Stanislav Yudin*, pictured below in *Figure 17*. The dimensions of this ship are as follows: draught 5.0 m, air draught 63.2 m.

261. The company has delivered seven 75,000 m3 LPG/ammonia tankers. As the demand for liquid natural gas carriers (LNG) is quickly growing, and as there is substantial know-how within the Kværner group, this company is also involved in future LNG ship projects. Typical delvieries of other special ships have been cable layers, dredgers, research ships, naval vessels. Also container ships, LASH barge carriers, RoRo ships, chemical tankers, product tankers, arctic transport ships, reefer ships, push barge systems are included in the list of products.

D. OFFSHORE CRAFT

As we have seen, the most immeditate effect of the planned East Channel bridge is to close off navigation through the Great Belt by drill ships, semisubmersible drill rigs and jack-up rigs.

1. *General*

262. Rauma-Repola Offshore (RRO) builds offshore craft in Finland for the international offshore oil and gas exploration industry. Construction of such craft was started at the Mäntyluoto Works of Rauma-Repola in the city of Pori in 1972. Since that time 23 jack-ups, semisubmersibles and drillships have been delivered from the yard[1]. Two of these were multiservice semisubmersibles without a drilling derrick. Two jack-ups were delivered to the Vyborg Shipyard in Russia with an unfurnished deck. The Russians installed e.g. their drilling equipment onboard. The number of semisubmersibles built by Rauma-Repola makes the company the biggest builder of this type of craft in Europe.

263. The following three tables list all the offshore craft built by Rauma-Repola Offshore as well as examples of tendered craft, annual deliveries of MODUs world wide and from RRO as well as MODUs presently under construction. (*Tables 16-18.*)

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[1] See Annex 51.

TABLE 16. OFFSHORE CRAFT BUILT BY RRO AND EXAMPLES OF TENDERED PROJECTS

A. SEMISUBMERSIBLES

BUILT 1974-79 **Design**	**AIR DRAUGHT (M)**	**WATER DRAUGHT (M)**
Pentagon 84	96,7	11,8
Pentagon 85	96,7	11,8
Pentagon 86	96,7	11,8
Aker H-3	90,0	7,0
Aker H-3	90,0	7,0
Aker H-3	90,0	7,0
Aker H-3	90,0	7,0
Aker H-3	90,0	7,0
Aker H-3	90,0	7,0

BUILT 1980-89 **Design**		
Ocean Ranger	112,2	7,5
MSV	66,6	11,5
Friede & Goldman L907	106,2	7,5
Friede & Goldman L907	106,2	7,5
Friede & Goldman L907	106,2	7,5

TENDERED 1984-89 **Design**	**AIR DRAUGHT (M)**	**WATER DRAUGHT (M)**
Trendsetter	102,0	13,0
RR-2952	101,3	11,6
Ultra Yatzy	83,6	11,8
Goodrich	109,0	12,2
RR-2152C (Floating Production Vessel)	abt. 65,0	7,6

TENDERED 1990- **Design**		
Reading & Bates	abt. 95,0	abt. 14,0

B. JACK-UPS

BUILT 1985- **Design**		
Gusto	144,9	10,3
Gusto	144,9	8,5
Minsudprom*	140,0	over 8,0
Minsudprom*	140,0	over 8,0

* Built in cooperation with the Vyborg Shipyard in Russia.
Draught information as received from the yard.

(JACK-UPS, CONTINUED)

TENDERED 1988- **Design**	**AIR DRAUGHT (M)**	**WATER DRAUGHT (M)**
ETA	136,9	8,0
TPG-500	160,0	10,0
Friede & Goldman Mod VI	152,3	10,0
Friede & Goldman Mod V	155,0	8,0
Friede & Goldman Mod II	127,6	7,0
MSC CJ62 S120	159,8	8,6
MSC CJ54	152,0	8,0
Friede & Goldman	204,8	9,2
Reading & Bates	186,0	8,0
King Kong	158,4	11-12

C. DRILLSHIPS

BUILT 1981- **Design**		
Gusto Pelican	80,3	7,3
Gusto Pelican	80,3	7,3
Gusto Pelican	80,3	7,3

TENDERED 1989- **Design**	**AIR DRAUGHT (M)**	**WATER DRAUGHT (M)**
Gusto Pelican (Repair work)	80,3	7,3
Gusto Pelican (Repair work)	80,3	7,3

D. OTHER OFFSHORE CRAFT

TENDERED 1985- **Design**		
RR-3090	107,0	8,0
RR-3190	106,0	8,0
MSV	60,4	15,2
GVA 4500 (Floating Production Vessel)	abt. 60,0	12,8

E. OTHER OFFSHORE PRODUCTS

TENDERED 1985- **Design**		
Drilling module of a fixed production platform	72,3	abt. 3,0
Drilling module of a fixed production platform	52,0	abt. 3,0

TABLE 17. ANNUAL DELIVERIES OF MODUS WORLD-WIDE AND FROM RAUMA-REPOLA OFFSHORE:

YEAR	WORLD-WIDE DELIVERIES	DELIVERIES FROM RRO	RRO'S SHARE %
1974	28	1	3,6
1975	39	2	5,1
1976	41	2	4,9
1977	36	4	11,1
1978	18	1	5,6
1979	32	0	0
1980	35	1	2,9
1981	85	1	1,2
1982	114	2	1,8
1983	67	1	1,5
1984	18	2	11,1
1985	16	2	12,5
1986	9	0	0
1987	7	0	0
1988	9	0	0
1989	2	0	0
1990	4	0	0
1991*)	3	1	33,5
TOTAL	573	20	3,5

*) By the end of October, 1991

TABLE 18. MODU'S UNDER CONSTRUCTION IN NOVEMBER 1991 (WORLD-WIDE):

MODU type	Client	Builder
Jack-up	Minsudprom	Vyborg Shipyard and Rauma-Repola Offshore
Jack-up	National Iranian Oil Company	Rauma-Repola Offshore
Jack-up	Brobekk	Marathon Le Tourneau
Jack-up	Maersk Drilling	Far East Levingston
Jack-up	Maersk Drilling	Far East Levingston
Jack-up	Santa Fe Drilling	Far East Levingston

264. Considerable investments have been made by Rauma-Repola Offshore to meet the changing demands of the industry. During the past 20 years the market has evolved through four generations of offshore mobile craft technology. With the investments made by RRO in the production facilities the capability to build all MODU designs has been maintained. The most essential physical parameters of a modern offshore craft yard are the size of the assembly, transfer and transportation facilities. During the 1980s RRO focused its investments in improving its competitiveness in those areas. Although some sections or other parts of offshore mobile craft may be subcontracted out of the yard to improve cost competitiveness the assembly and all final phases of the delivery take place at the company's own yard.

265. The following investments have been made by Rauma-Repola Offshore to facilitate the competitive construction, transfer and transportation of all types of heavy offshore products

1 Assembly yard with offloading structures and transfer rail systems;

2 Jack-up assembly supports;

3 Load-out/transportation barge;

4 Deep water (30 m) basin.

266. These investments, totalling some 61 million Finnish Markkas (USD 15,2 million), are additional to the investments made as the yard was established. Through these improved facilities a construction time 6 months shorter for semisubmersibles and 2 months shorter for jack-ups is achieved compared with the traditional assembly method.

267. The deep water basin was built as an integral part of the 10 km long deep water channel from the open sea to the Tahkoluoto harbour of the City of Pori (for illustration, see *Figure 18*).

268. The basic investments in deepening the channel and the harbour basin to 17,5 metres (respective draught 15.3 m, cf. Annex 4) in 1983-85 amounted to 113 million Finnish Markkas (USD 28,2 million). Dredging the deep water basin to 30 metres cost an additional 11 million (USD 2,7 million).

269. The deep water basin area is used as the base for work on offshore craft whose draught is too deep for floating to the quay of the yard. The basin is also used for mating operations where the hull of a semisubmersible is lowered to allow the floating of the deck on top.

270. The resources within the domain of Rauma-Repola's offshore industry include the main yard at Mäntyluoto in Pori, the Kalajoki Works and a big engineering group, now organized in a separate company PI-Rauma Oy. All these resources are needed and used in a construction project for an offshore mobile craft. The total number of employees involved in these projects is appr. 1000.

271. The market for new offshore craft has been very cyclical since the early 1970s. Consequently the work load at RRO has varied considerably. As a result of the higher workloads, Rauma-Repola Offshore has increased its own work force to 1500; there has been a corresponding increase in the work force of subcontractors at the yard.

272. The economic feasibility of RRO's MODU construction is very sensitive to any changes in the assembly process. Both in respect of the delivery time and construction cost it is essential that the craft is completed in Finland. If this were not possible doubling of many costs could not be avoided and the delivery would definitely be delayed for several weeks. This would not only cause additional construction and interest cost but also disqualify RRO from what is a highly competitive market.

273. Rauma-Repola builds all three types of offshore craft. It is one of the few builders of heavy offshore craft in the world. This is shown in the references of the MODUs delivered and in the list of rigs under construction at this writing, November 1991. The facilities and the production organization of RRO have been developed to meet the competitive requirements of turn-key deliveries of MODUs in the heaviest class.

274. In addition to MODUs the international offshore oil and gas industry needs other craft as well, for example vessels for oil and gas production. RRO has developed its own semisubmersible production vessel design and has been several times in a position to bid on building a floating production vessel based on its own or somebody else's design. These have normally drilling equipment and derrick and thus an air draught higher than 65 m.

275. Other offshore craft are vessels for service and support purposes, such as multi-service vessels (MSVs) and diving support vessels (DSVs). RRO has built two MSVs and has been in a position to bid on several others. Typical of these craft is a heavy propulsion system for keeping the craft positioned when it is operating. The propulsion system gives the craft a deep draught.

2. *Outlook*

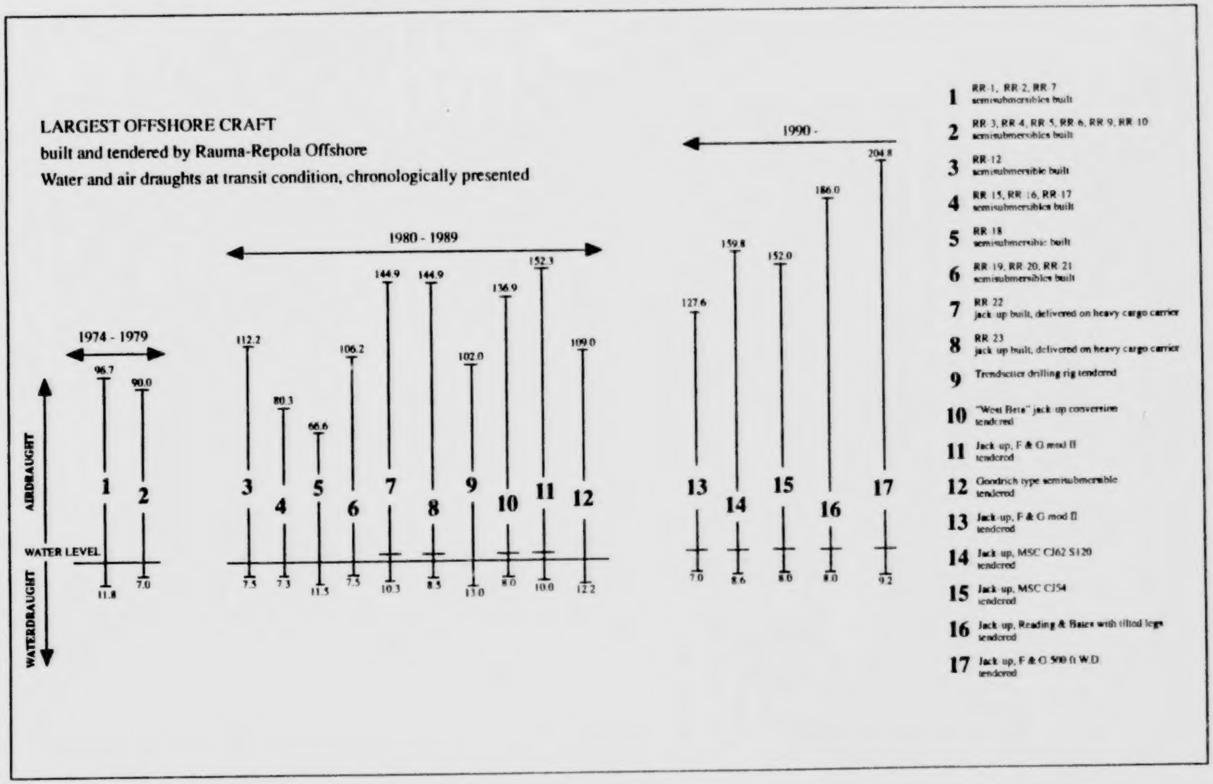
1. The Movement to Heavier Craft

276. There is a growth trend both in the air draught and the water draught of offshore craft. The increase in the air draught of jack-ups is due to the lengthening of legs. Some of the newest designs exceed 200 m. New technology allows the use of jack-ups in deeper waters than hitherto. Longer legs are therefore required which makes the whole craft heavier. Excluding the smallest, the jack-ups tendered since 1990 have a transportation draught of at least 8.0 m.

277. The need to drill for oil and gas in deeper waters than before also influences semisubmersible designs. In order to be able to work in deeper waters and to drill deeper the semisubmersible has to carry heavier loads on its deck. This makes the MODU itself bigger and heavier.

278. The trend of the MODU air and water draughts, based on designs built or bid by RRO is shown below.

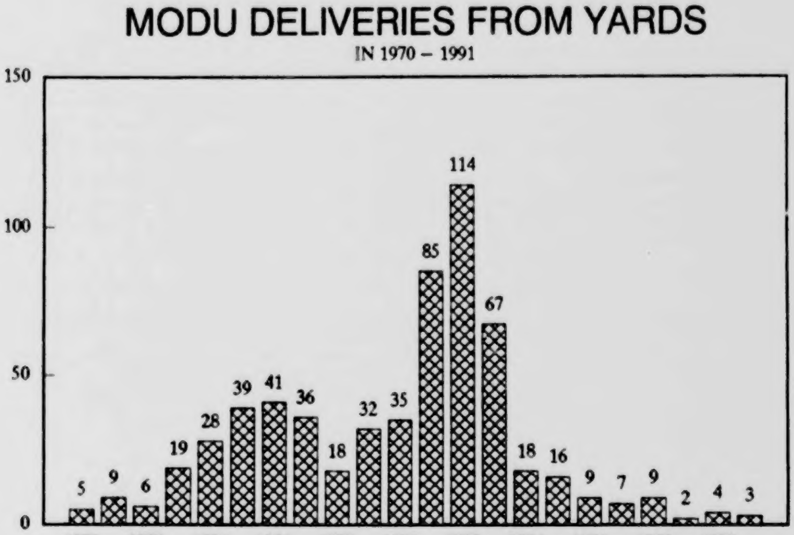
TABLE 19. TREND OF MODU AIR AND WATER DRAUGHTS:



2. The market for offshore craft

279. The cyclical nature of the international MODU market is pictured in table below.

TABLE 20: MODU DELIVERIES 1970-91:



*Situation: End of October, 1991

280. The number of MODUs delivered annually during this period varies from a high of 114 in 1982 to a low of 2 in 1989. A rig builder like RRO has to accommodate itself to these changes still maintaining the investments and capabilities on a reasonable level at all times.

281. The number of internationally marketed *competitive* offshore craft is 554 with 373 jack-ups, 151 semisubmersibles and 30 drillships[1]. (The total numbers for drillships, semisubmersibles and jack-ups are contained in paragraphs 164, 169, 173 and 179 above.) Thus, there are over 100 MODUs not counted in the competitive fleet any more. The average age of the competitive fleet was in the summer 1991: jack-ups 12 years, semisubmersibles 13 years and drillships 14 years. In 10 years this fleet will be on the average well over 20 years old, higher than the age of MODUs deleted from the fleet in the 1980s. In the higher scenario with a scrapping age of 20 years, some 380 of the existing MODUs will be deleted by 2002, and in the lower scenario with a scrapping age of 25 years this competitive fleet would be reduced by some 140 units. Currently there are only five new MODUs under construction for the international drilling market.

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[1] *Ocean Industry*, September 1991, pp. 122-123.

TABLE 21. THE AGE PROFILE OF MODU FLEET:

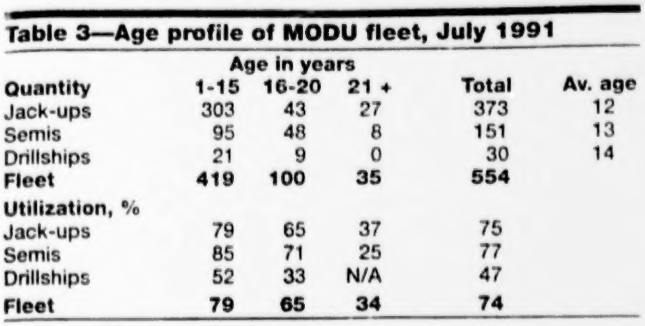


Table 3—Age profile of MODU fleet, July 1991

	Age in years				
Quantity	**1-15**	**16-20**	**21 +**	**Total**	**Av. age**
Jack-ups	303	43	27	373	12
Semis	95	48	8	151	13
Drillships	21	9	0	30	14
Fleet	**419**	**100**	**35**	**554**	
Utilization, %					
Jack-ups	79	65	37	75	
Semis	85	71	25	77	
Drillships	52	33	N/A	47	
Fleet	**79**	**65**	**34**	**74**	

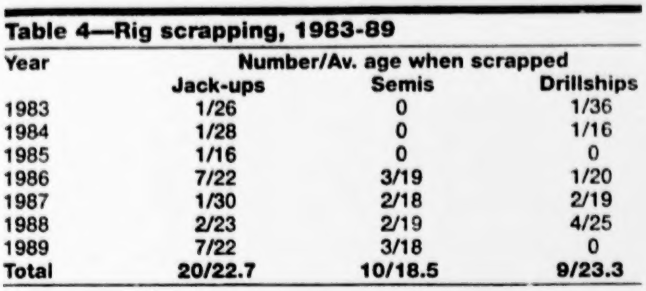


Table 4—Rig scrapping, 1983-89

Year	**Number/Av. age when scrapped**		
	Jack-ups	**Semis**	**Drillships**
1983	1/26	0	1/36
1984	1/28	0	1/16
1985	1/16	0	0
1986	7/22	3/19	1/20
1987	1/30	2/18	2/19
1988	2/23	2/19	4/25
1989	7/22	3/18	0
Total	**20/22.7**	**10/18.5**	**9/23.3**

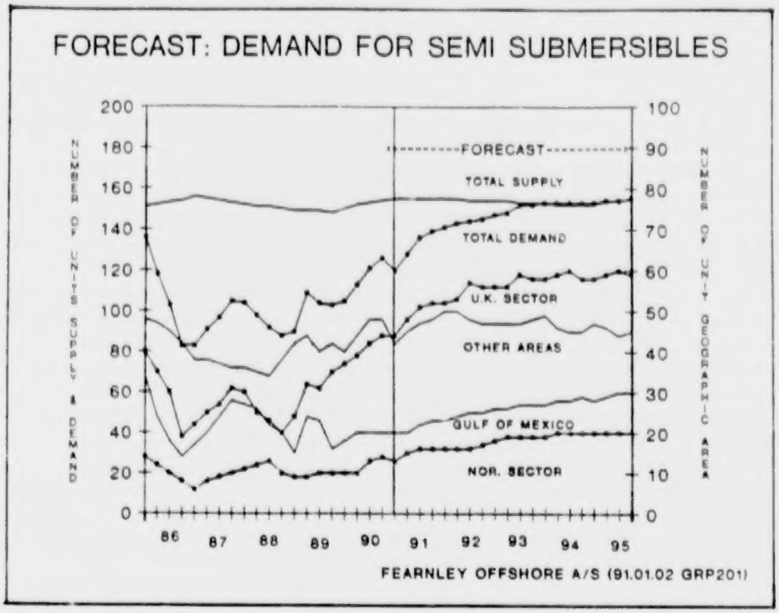
282. Taking into consideration the need to replace scrapped units and the forecast growth in the demand for drilling services, the number of new MODUs to be built by the year 2002 will be 150-400. Applying the average market share of RRO in the past deliveries and MODUs under construction the number of offshore craft to be built by RRO during this period will be 8-20. This does not include other offshore craft like floating production vessels which RRO is frequently bidding on.

283. The need for new MODUs or extensive modernization of existing units is additionally boosted by changes in the technical and regulatory environment, such as increasing loadcarrying capacity, new classification and insurance requirements as well as changes in oil company guidelines.

TABLE 22. FORECAST (FEARNLEY OFFSHORE): DEMAND FOR SEMISUBMERSIBLES:

"Worldwide

To summarize our forecast, we refer to the graph below. We anticipate to reach a permanent 90 % utilization by mid 1991. This is the level at which the market is considered to be in balance. Approaching this level, we expect the dayrate to show further improvements compared to the current level.



As can be seen, the strongest pick-up for the semi market has been in the U.K. sector of the North Sea. We expect that close to 50 % of the competitive semi fleet will be employed in the North Sea area, and 20 % in the Gulf of Mexico."

284. RRO has maintained its position as a major MODU builder during the depression years in the market, participating in the construction of three units during the second half of the 1980s and the beginning of the 1990s. Having succeeded in this, RRO is one of the few builders of heavy MODUs active today.

3. The dismantling option

285. RRO receives invitations to bid on offshore craft from international drilling contractors. The contractors base their inquiries on designs preferred by oil companies - their own customers. The inquiry package is the same for all bidder candidates. If the invited yard decides to bid and submits a proposal interesting enough to the drilling contractor this

will audit the yard to make sure that the yard is capable of delivering the MODU as specified and on time. International competition will then weed out builders who cannot fulfil the common requirements.

286. A height of 65 metres for the Great Belt bridge would severely damage RRO's competitiveness on the international market. RRO could not deliver MODUs ready to work from its yard at a competitive price and on time.

a) Dismantling the derrick?

287. In RRO's market segment of heavy and harsh environment offshore craft there has never been an inquiry to bid on a unit with a derrick and the related drilling systems to be disassembled during transportation or operation. Should this for any reason be done as a part of the delivery of a newbuilt MODU the builder would automatically be disqualified from the competition due to extra costs[1] and extended delivery time[2]

288. Before transporting a new MODU from the yard to its first operating location extensive test runs and trials have to be carried out. The systems to be tested number around 100, most of them applying also to the drilling system. It would be totally unfeasible to think of disassembling, reassembling and testing again these systems after the MODU has been delivered from the yard.

289. To demonstrate the unfeasibility and high cost of disassembling and reassembling the kind of derrick concerned it can be mentioned that these operations would have to be extended to the pipe-handling winch, motion compensator as well as to the mud, cement, cooling, pressurized air, instrumentation, fire and alarm piping, etc. It would be essential that the disassembling and reassembling of the derrick with its numerous systems were carried out by the same people. Part of the crew of the craft would need to stay on board to run the utilities.

290. To postpone the assembly of the derrick to be carried out somewhere on the other side of the Great Belt is simply not feasible from a logistical and economic point of view. The logistics of RRO's MODU construction are based on parallel progress of different parts of the unit to cut construction time. Leaving part of the work uncompleted at the yard would destroy the competitiveness of the whole construction process.

b) Dismantling the legs of a jack-up?

291. RRO has never received a request to bid on a jack-up whose legs were intended to be cut and joined somewhere outside the yard. If such a requirement were for some reason imposed on RRO alone the company could be disqualified from the competition on the basis of extra costs[3] and extended delivery time[4]. Such a requirement would interfere with the efficient use of RRO's assembly investments and with the logical sequence of completing the work in a competitive manner[5] .

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[1] Annex 37.

[2] Annex 38.

[3] Annex 39.

[4] Annex 40.

[5] Cf. Annexes 53 and 41.

c) Dismantling thrusters?

292. Should a semisubmersible designed and built with thrusters be transported through an alternative channel to that of the Great Belt, its draught could technically be reduced by removing the thrusters for passing the place with draught restrictions and reinstalling them after this passage. Considerable extra cost[1] and loss of time[2] are caused also by these measures.

293. In the case of delivering a new MODU from the yard, as has been the case with Rauma-Repola, every day of stoppage during the transportation would cause a considerable interest cost to the owner as well as lost revenue because he cannot contract his unit for drilling during the extra delivery time. The revenue made in the North Sea with a harsh environment rig is in the range of 100.000 US dollars per day.

Section IV. Other Effects

A. EFFECTS ON EXCEPTIONALLY LARGE TRANSPORT: CRANES - KONE OY, A CASE STUDY

294. We have already seen that the Great Belt bridge will effectively prevent the use of heavylift transport ships as a means to move offshore craft between the North Sea and the Baltic. Another type of obstruction caused by the Danish bridge plan affects the *transport of large cranes.*

295. The Finnish company KONE Corporation has during the last 20 years carried out 150 transports of 220 cranes[3]. The typical transportation height of such cranes varies between 55-100 m. It is estimated by the KONE Corporation that in the future such transports will take place through the Great Belt approximately twice a year.

296. Annex 57 contains a detailed survey of the transports undertaken by KONE since the inception of its transportation activity in 1969. Though most of the past transports have taken place inside the Baltic Sea, 27 transports have been taken from the Baltic through the Danish straits. The two cranes delivered to Gothenburg, Sweden, (North Sea), for example, had a height of 100 m (For the destinations of Kone crane transports, see *Figure 19.*).

297. Cranes are transported basically by using two methods. The first method is the towage of the crane on a barge. Though originally intended for short distances, towage can also be used for ocean voyages. Kone has had towage distances of over 7.000 nautical miles (for illustration: see *Figure 20*).

298. The second method is to use heavylift transport vessels to undertake the carriage. The advantage of this mode is its much greater speed. These vessels can attain a speed of 12 to 15 knots in comparison to the barge speed of 4 to 8 knots. With the manoeuvrability features of these vessels, most of the deficiencies of a barge towage system can be avoided. As pointed out in paragraphs 186-188 above, carriage by heavylift ships is an inherently much safer alternative than towage (For illustration, see *Figure 21.*).

B. EFFECTS ON OFFSHORE ACTIVITY IN THE BALTIC

299. In Section I above, we have surveyed the effects of the Great Belt bridge plan on passage by offshore craft mainly from the Baltic to the North Sea. Increase of offshore

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[1] Annex 55.

[2] Annex 56.

[3] Annex 57.

activity in the Baltic will, however, inevitably increase. As a result, there will also be a need to bring offshore craft from outside sea areas into the Baltic. This section will briefly survey the prospects of developing the Baltic Sea as an oil exploration region.

300. Oil and gas exploration activities in the Baltic Sea started in the late 1970s but the area is still little explored. So far, commercial discoveries have only been made in eastern parts of the Baltic Sea, off Poland and the USSR.

301. In this section, the Baltic Sea and its hydrocarbon potential is covered country by country.

302. Oil exploration on the *Danish* continental shelf started at the beginning of the 1960s. First signs of oil were found in 1966 in the Danish North Sea sector, but the Baltic Sea continental shelf gained interest as a potential exploration area only in the 1980's. The first exploration concessions in the Danish Baltic Sea continental shelf were granted in 1985[1].

303. Two large sedimentary basins with commercial oil and gas potential are located in the Danish Baltic Sea continental shelf. The North German Basin covers a large area both onshore and offshore in Denmark and northern Germany. On the Danish side several onshore wells and one offshore well have been drilled. The offshore well is known as KEGNAES-l in block 5410/05. The drilling started in August 1985 and was completed in October 1985 after testing the well. No test results are released, but running an expensive test program gives an indication that probably some hydrocarbon shows have been found. A jack-up type drilling rig *Dyvi Epsilon* (now *Neddrill 7*) was used. It has a transit draught of 4 m (13 feet) and its legs are 105 m (344 feet) high. Usually the rig is operating in the North Sea.

304. Perhaps more promising is the Ronne Graben basin on the western side of Bornholm. The geology of this basin is similar to Central Graben in the North Sea where all the current producing Danish oil and gasfields are located. On the SW side of Bornholm several exploration blocks were released in 1985 or later. The area is widely surveyed with seismic vessels and international oil companies are active partners in the concessions. Two wildcat wells were drilled in 1989 and the jack-up type rig *Glomar Moray Firth 1*, normally operating in the North Sea, was used for both. The draught of this craft is 5.3 m (17.3 feet) and leg length 151 m (498 feet). Both wells (PERNILLE-l, April-June '89, block 5514/30 and STINA-l, June-July '89, block 5414/7) have been declared "tight", e.g. no information is available though the operator of Pernille-l, Norsk Hydro, is optimistic about the potential of the area.

305. In 1989 a total of four exploration wells were drilled on the Danish continental shelf, two of which are in the North Sea and two on the SW side of Bornholm in the Baltic Sea. During 1991 and 1992 there will be around five exploration wells being drilled annually, some of which might be located around Bornholm due to concession commitments.

306. *Sweden* has been producing oil on the island of Gotland for decades and the surrounding continental shelf has been systematically explored since the 1970s. The Gulf of Bothnia has been surveyed several times during the 1980s, but is so far kept outside the concession rounds.

307. The 1970s was the most active era in exploration on the Swedish continental shelf, but new optimism and activity has arisen after large oil discoveries off Latvia and Lithuania and the solution of the continental shelf dispute between Sweden and the USSR in 1988. This agreement has released large areas for exploration in the previous "grey zone" on the eastern side of Gotland. A final drilling application was submitted in April 1991 by an

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[1] Cf also *Map No. 6* (Danish licence area) and *Map No. 7* (Sedimentary basins in Denmark).

international consortium, the "Grauten Group". If approval is given, drilling should start in the summer of 1992. Potential resources in the area may be as much as 180–240 million barrels. The well site will be located some 10 km north of Klints Bank. A jack-up rig will be utilized. Another important area is that wchich stretches from northern Poland near Gdansk to Öland. Several international oil companies have shown their interest in the potential of these areas by participating in concessions, and seismic surveys are currently being carried out. (Cf. *Map No. 8*: Petroleum Activity - South Sweden).

308. Detailed information on rigs used on the Swedish continental shelf is not available, but at least a semisubmersible type rig *Treasure Seeker* has been used. It operates normally in the North Sea and has a maximum operating depth of 380 m (1250 ft). The height of the hull is 36 m (120 ft) without topsides. Estimated minimum free height is 50 to 70 m. It has a transit draught of 6.8 m (21.98 feet).

309. In both parts of the previously divided *Germany* onshore oil and gas fields have been found. Some of these fields - for example, Kiel and Schwedeneck-See off Kiel - extend into the Baltic Sea continental shelf. Schwedeneck-See is developed with fixed platforms and production is currently about 5000–6000 barrels a day. No information is available concerning the exploration programs or rigs used in the western parts of the continental shelf. However, on the shelf previously governed by GDR the jack-up rig *Petrobaltik* has been used (see Poland). The former GDR's only oil and gas producing firm *Erdgas und Erdoil Gommern* is currently under privatization, and bids from international oil companies have already been received.

310. On the *Polish* continental shelf some commercial oil and gas discoveries have been made but not yet developed. The jack-up type rig *Petrobaltik* has been used. The rig was owned by a Joint Venture company Petrobaltik, and the participants were the USSR, GDR and Poland. The rig is now Polish property, and is offered for use in the whole Baltic Sea. The maximum operative water depth of the *Petrobaltik* is 91 m (300 ft). Its legs are 127.5 m (418 feet) long.

311. Poland is currently opening its onshore and offshore concessions to international oil companies. The first concession round is being planned and some 70 companies have shown interest and are considering whether or not to participate. Norwegian shipbuilder Kværner has signed a letter of intent with Gdnyia Shipyard. Plans include starting a maintainance service for North Sea based drilling rigs. (Cf. *Map No. 9* - Poland and the adjacent area.)

312. *Lithuania* is opening its onshore and offshore oil and gas fields to foreign companies and trying to boost up domestic oil production. Lithuania and Azerbaydzhan signed a technical cooperation agreement in October 1990 providing for assistance to Lithuania in future operations on the Lithuanian continental shelf. Denmark signed a similar agreement with Lithuania in 1991.

313. Eight wells were drilled on the Lithuanian continental shelf by the *Petrobaltik* (see Poland) in the 1970s and 1980s. Three wells were dry but one had oil shows. In 1983 a discovery was made (D-6 field) and four successful wells were drilled to appraise the discovery. The D-6 field is considered commercial and likely to be developed in the near future. A rig utilization is at the moment planned to bring shut-in wells on stream. Some Lithuanian geologists estimate potential undiscovered oil resources on the Lithuanian continental shelf as high as 350 million barrels. (cf. *Map No. 10*: Petroleum Activity - USSR Baltic Area).

314. One discovery was made in 1988-89 on the *Latvian* continental shelf. The reserves are estimated at approximately 50 million barrels.

315. *Kaliningrad Oblast* (Russian Federation): Onshore reserves and production are large, but the continental shelf has not yet been widely explored. Offshore reserves are likely

to be significant due to large discoveries in neighbouring areas on Polish and Lithuanian continental shelves.

316. *Estonia* has no known liquid hydrocarbon reserves, but is an important oil shale producer. The production is from seven underground and four opencast mines.

317. *Finland* has no known liquid hydrocarbon reserves.

318. In conclusion, it may be noted that there is increasing interest in the hydrocarbon potential of the Baltic Sea because of several reasons:

1. Relatively unexplored area.
2. Discoveries are encouraging.
3. Close to existing and future markets.
4. Recent economic and political developments in eastern Europe - need to increase domestic oil production in new independent states.
5. Non-hostile environment - smaller fields can be commercial.
6. Global supply and demand of oil is in balance increasing production capacity in mature oil producing regions can be expensive.

319. Every country around the Baltic Sea has foreseen the possibility for offshore oil exploration in their legislation, whether directly in petroleum legislation or in mining legislation (as Finland).

320. During the last decade at least three different drilling rigs (two jack-ups and one semi-submersible) have been transported through the Danish straits from the North Sea to the Baltic Sea for offshore oil and gas exploration. As activity increases, more rigs will need to pass into the Baltic.

321. The only rig permanently based in the Baltic Sea is the jack-up *Petrobaltik*. As offshore activity will increase more exploration craft are needed. During exploration activity, it is customary, for the contractor to use second-hand rigs previously employed elsewhere e.g. in the North Sea. For many of such craft, the Great Belt bridge will present an effective hindrance.

322. In general, oil drilling is carried out by independent contractors. The contractor selects the most suitable drilling unit according to the special conditions of the drilling site. Day rate for the drilling rig is not the only criterion for selection: drilling location, water depth, formation characteristics (depth, temperature, pressure, stratigraphy), drilling unit capacities (mud pits, water pits, fuel storage, deck load limit, cranes, testing equipment) etc., all play a role. Rig mobilization costs are normally small compared to total drilling costs, and therefore moving rigs half way round the world is not uncommon.

323. The Baltic Sea is not a big enough market for several different drilling units operating only locally. If the Baltic Sea were separated from other offshore exploration regions, oil companies would be forced to use a monopolistic contractor - with all the additional costs and other problems such a position would entail.

CHAPTER VII

THE UNIQUENESS OF THE GREAT BELT BRIDGE

Section I. The Great Belt Bridge is the Only Obstruction across a Territorial Sea Constituting Part of an International Strait

324. It has been claimed by Denmark that the 65 m clearance chosen for the East Bridge conforms to an international " standard for bridges across major waterways"[1] . In this section of the memorial the factual background of this Danish claim will be examined.

325. Before surveying existing practice concerning bridges, however, it must be noted that the Danish attempt to discern an "international standard" of bridge-building is ill-founded. There are crucial differences between the planned Great Belt bridge and *all existing bridges*, which render the Great Belt bridge project unique. The Great Belt bridge is the sole case in which a bridge is being constructed over an international strait consisting of a part of the territorial sea of the coastal state. All other existing bridges cross waterways that traverse the internal waters of the coastal State. The uniqueness of the Great Belt bridge lies in that it presents the first occasion in the history of international navigation in which a strait that is a part of the territorial sea is being crossed by a physical obstruction.

326. Though the Great Belt is unique in this sense, however, it is of course not unique as an international waterway. Accordingly, Section III will make a brief review of situations in this limited sense comparable to the Great Belt. The conclusion drawn from it is that when a seaway has an international status, States have preferred a technical alternative other than a bridge.

Section II. Fixed Links Across Non-international Waterways

327. The *Written Observations* of Denmark relating to the request for provisional measures make reference to a number of bridges in support of the proposition that "[a] bridge clearance of 65 metres takes account of the maximum height of contemporary ships and may now be considered an 'international standard' for bridge heights" (paragraph 65). After a brief reference to bridges existing in Turkey and Japan and the bridges in the Panama and Kiel Canals, ten bridges are mentioned.[2]

328. All of these ten bridges are situated in internal waters. All of them cross a waterway traversing the interior of the coastal State itself. Any obstruction they may create is self-inflicted and suffered by the bridge State itself. None of them crosses an international waterway - even less an international strait. The notion of free passage is inapplicable in all of them.

329. Specific mention is made in the Danish Written Observations of the Kanmon Bridge and the several links between Honshu and Shikoku (para. 63). But the Kanmon bridge (and the Kanmon tunnel) are situated inside the baselines of the Japanese territorial sea. The

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[1] Statement by Professor Gimsing, 2 July 1991.

[2] The Verrazano Narrows Bridge (New York), Golden Gate Bridge (San Francisco), Bay Bridge (San Francisco), Lions Gate Bridge (Vancouver), Tagus River Bridge (Lisbon), Maracaibo Bridge (Venezuela), Guanabara Bay Bridge (Rio de Janeiro), Sydney Harbour Bridge (Sydney), Alvsborg Bridge (Gothenburg) and Yokohama Bay Bridge (Yokohama).

location is entirely within Japanese internal waters. Moreover, it is possible to circumnavigate the route passing under the Kanmon bridge by passing around the Kyushu island. The Honshu-Shikoku links cross the Seto Naikai (Seto Inland Sea), which is closed by straight baselines and also falls wholly within Japanese internal waters.[1] None of the five straits recognized by Japan as undoubtedly "international straits" (the Soya Strait, the Tsugaru Strait, the eastern and western channels of the Tsushima Strait and the Osumi Strait) is crossed by a bridge.

330. The bridges mentioned by Denmark are not, of course, the only large bridges in the world. Others could be added to the list. There are several long bridges in Japan, the United States and the United Kingdom, for example. There is also the Öland bridge in Sweden and the Saudi Arabia - Bahrein Causeway in the Persian Gulf. The relevant point is, however, that no question of free passage under international law can arise in respect of them. None of them crosses an international strait and none of them poses an obstacle - a definite obstruction for any State between its coasts and world oceans.

331. In other words, even if one were to look for an "international standard" of bridge height (a dubious venture in the first place), these situations could not be cited in support of any such standard.

Section III. Fixed Links Across International Waterways

332. If attention is turned from non-international waterways to international waterways, the situation is completely different. Apart from the Bosphorus bridges - and even they lie entirely within internal waters - no situation comparable to that of the Great Belt exists. There simply are no bridges over international straits situated in territorial waters. What is more, in a number of comparable cases the coastal State or States have deliberately chosen an alternative to a bridge solution.

333. There have, of course, been projects related to indubitably international straits, such as the plans for fixed links over Gibraltar or the Strait of Messina. Neither project has reached fruition. In neither case has there been a definite decision to opt for a bridge alternative, even less a bridge solution that would not accommodate all existing ships.

334. In the following paragraphs, situations are reviewed in which there are links over indubitably international waterways.

A. CANALS

335.The three most notable canals in the world - the Kiel, Suez and Panama Canals - all are situated entirely within the territory of the respective canal States (Germany, Egypt and Panama). They pose limitations of draught and width and sometimes of height to ships passing through them. They are indubitably international waterways in the sense that they are much used by international shipping. Their navigation regime is also based on international treaties, as well as on the canal States' declarations. Their legal status is, of course, different from the status of international straits. But what is perhaps more important is the conceptual difference between these man-made waterways and natural waterways such as straits. For while the navigational conditions in canals are the result of deliberate human intervention, the conditions in international straits are not.

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[1] Cf. Japan's Enforcement Order of 17 June 1977 of Law No. 30 of 2 May 1977 on the Territorial Sea, *UN Legislative Series, National Legislation and Treaties Relating to the Law of the Sea*, ST/LEG/SER.B/19, p. 57.

336. The *Kiel Canal* has several bridges. Also new bridges are to be built in the near future. As an example, the Kiel Holtenau Bridge can be mentioned. It will be a 518 metre long steel girder bridge with a horizontal span of 170 metre at water level. The vertical clearance will be the same as at other Kiel Canal bridges, i.e. 42 metres. In the same area there exists an older bridge, and a third one is to be built later. The Canal is an international waterway situated entirely in German territory (cf. Chapter I, section IV).

337. The *Suez Canal*, built in 1859-69, is situated in Egypt, 120 km east of Cairo. The northern end of this 161 km canal is situated at Port Said at the Mediterranean. Its southern end is at the Gulf of Suez. The Gulf is connected to the Red Sea, which again is connected to the Indian Ocean via the Bab el-Mandeb Strait and the Gulf of Aden. The distance between the Mediterranean Sea and the Indian Sea is about 3500 km. At the narrowest point, the width of the canal at water level is 190 metres. The depth of the canal is 12 metres or more. There are no locks in this canal. It is the second busiest canal in the world; the recorded number of ships passing through it in 1980 was 22000.

The maximum beam of vessels transiting the canal is 210 feet (64 m) and the maximum draught is normally 33 feet (10 m). There is no maximum height to transit the canal. Special regulations govern the transit of drilling rigs, heavylift ships, integrated units and towed units.[1]

The Suez Canal Bridge at El Ferdan was completed in 1955. This bridge is a double arm swing bridge with a main span of 167 m. Its total length is 317 m. The bridge carries a single railway track, but it is free for passage of vehicles as well when no trains are scheduled to cross. The Suez Canal is an international waterway situated entirely in Egyptian territory. The navigational regime of the Canal is based on the 1888 Treaty of Constantinople[2], and the Egyptian Declaration of 24 April 1957[3].

338. The *Panama Canal* is situated on the Isthmus of Panama in Central America. It connects the Caribbean Sea with the Pacific Ocean. The length of the canal is 82 km. Its width on bottom level varies between 92 metres and 300 metres. The depth is 12.5 metres or more. There are several locks and lakes between the two ends of the Canal. The construction of the Panama Canal was completed in 1914. The Panama Canal reduces the sea route from the Atlantic Ocean to the Pacific Ocean by more than 14000 km. In 1980, 14000 vessels passed through the canal. The maximum dimensions of ships transiting the Canal are: length 294 m, beam 32,61 m, draught 10,81 m, height 57,91 m.[4]

339. There are at least two notable bridges across the Panama Canal. The one built first, the Miraflores Bridge, was completed in 1942. It is a swing bridge. The Thatcher Ferry Bridge was completed in 1962. Its total length is 1.6 km. The vertical clearance at the main span is 61 metres. The sovereignty of Panama over the Canal and the Canal zone is explicitly recognized in the Panama Canal Treaties of 7 September 1977[5], though the rights of operation are vested in the United States until the year 2000. These treaties also provide for the openness of the Canal for peaceful transit by ships of all nations on equal terms.

340. Each of the three canals has always had limitations of width and draught. Height restrictions apply in Kiel and Panama Canals. Detailed regulations have governed traffic in

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[1] Suez Canal Authority, *Rules of Navigation*, January 1986 pp. 71-83, 99-101.

[2] Cf. Martens, *Nouveau recueil général*, 2ème séries, tôme XV, pp. 557-566.

[3] For the text, cf. 51 *American Journal of International Law* (1957), pp. 673-675.

[4] Panama Canal Treaty, 1280 UNTS. p. 3.

[5] Panama Canal Commission, *Marine Director's Notice to Shipping*, No 1-91 (1 January 1991) pp. 2-7.

them. These limitations are a consequence of the canals' artificial character and cannot, therefore, be held to support an international standard of creating *new* limitations for passage in international straits.

B. DOVER STRAIT

341. The Dover Strait (English Channel) is located between France and the southern part of England. It is one of the busiest international sea routes. It can be circumnavigated, but that would mean a detour of approximately 2.500 km around the British isles.

342. The strait is less than 24 miles wide for a part of its length. At the end of 1971, France extended its territorial sea from 3 to 12 miles, subject to a median line in the strait.[1] Britain did likewise by the Territorial Sea Act 1987.[2] On 2 November 1988 the two Governments published a Declaration in which: "...the two Governments recognize rights of unimpeded transit passage for merchant vessels, state vessels and, in particular, warships."[3]

343. It was the dream of Napoleon two centuries ago to link the British Isles with France. In the 1880's an attempt was made by Englishmen who built a 2.5 km long tunnel towards France. This project was, however, discontinued for military reasons. In the 1970's the construction work was started again, but because of the bad economic situation due to the oil crises the work was stopped again. The final attempt to build the Channel tunnel began in July 1987. This led to a breakthrough in October 1990. The construction work is estimated to be completed in spring 1993.

344. The tunnel system under the English Channel, called **Eurotunnel**, consists of three parallel tunnels: two railway tunnels and a service tunnel between them. The distance between the individual tunnels is 15 metres. The width of the running tunnels is 7.6 metres and that of the service tunnel is about 4.5 metres. All three tunnels are connected by cross passages of approximately 3.3 metres diameter, which are required for safety and operational reasons, at 375 metre intervals. The total length of the Eurotunnel between the tunnel entrances is 50 km, of which about 37 km is under the sea. At the deepest point the tunnel is located about 70 metres below the seabed of the Strait of Dover. The section under the sea is entirely below the seabed, which means that the tunnel does not impede sea traffic at all. The Eurotunnel will be operated only by trains, which will carry cars and people.

345. The Channel fixed link crosses an important international sea-route which, at the time of its planning, contained a high seas channel but is now a part of the territorial seas of the two coastal States. Its international character was taken into account in the relevant preparatory materials. Thus, it was noted by the British Ministry of Transport, in its 1963 Report on the Fixed Link, that a bridge alternative:

> "... could not be carried out, having regard to the principles of international law, until Great Britain and France had sought the concurrence of the States principally concerned with navigation in the Channel. An agreement of this kind, which could in particular be concerned with the drawing up of a system for the regulation of navigation, would certainly involve lengthy negotiations which would only with difficulty be brought to conclusion."[4]

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[1] Law No. 71-1060 of 21 December 1971. *UN Legislative Series, National Legislation and Treaties Relating to the Law of the Sea*, ST/LEG/SER.B/18, p. 17.

[2] UN Office for Ocean Affairs and the Law of the Sea, *Current Developments in State Practice, No. II (1988)*, p. 48.

[3] Annex 58.

[4] Annex 59. The citation is from para. 1.9.

In short, a bridge alternative was considered for the English Channel, but it was rejected in favour of a tunnel, *inter alia* for the reason that the bridge would have required international negotiations among all concerned nations, the results of which would have been uncertain.

C. THE TSUGARU STRAIT, JAPAN

346. The Tsugaru Strait is located between Honshu, the main island of Japan, and Hokkaido, the northern island. Its width at the narrowest point is about 20 km. The Tsugaru Strait can be circumvented by circumnavigating Hokkaido Island, but this would mean approximately a 1500 km detour. The strait has a wide high seas channel in the middle. At the time of the adoption of its Territorial Waters Law on 2 May 1977, Japan specifically restricted its claims to territorial waters in the Tsugaru, Korea, Soya and Osami straits to 3 nautical miles.[1] The Tsugaru Strait is mentioned as a "principal international Asian strait".[2]

347. In 1964 construction work for a tunnel, called the Seikan Tunnel, was started to link these two islands. The tunnelling work was completed in March 1985 and the first test run took place in March 1988.

348. The Seikan Tunnel consists of a main tunnel and a service tunnel. The distance of the tunnels is 30 metres. At every 600 metres there is a cross passage between the tunnels. The diameter of the main tunnel is about 10 metres and that of the service tunnel is about 4 metres. At its deepest point the tunnel is situated 100 metres below the sea bed, which means 240 metres below sea level. The lengths of the undersea and underground parts are 23.3 km and 30.5 km, respectively. The overall length of the Seikan Tunnel is 53.85 km, which means that it is the longest traffic tunnel in the world. The tunnel is used for rail traffic only.

D. BOSPHORUS

349. The straits of the Bosphorus and Dardanelles are located between the Mediterranean and the Black Sea. When sailing from the Mediterranean to the Black Sea, one has to pass through these two straits. At its narrowest point, the Bosphorus Strait is no more than 1 km wide. Its length is 30 km. It divides the city of Istanbul into two parts. Both the Bosphorus and Dardanelles are enclosed by straight baselines, adopted by Turkey in the Territorial Waters Law of 15 May 1964.

350. Passage through the straits is governed by the Montreux Convention of 1936,[3] which provides for "complete freedom of transit and navigation in the Straits" (Article 2).

351. The first *Bosphorus Bridge* (for illustration, see *Figure 22*) was built 6 km north of the entrance to the Sea of Marmara and opened to traffic in October 1973. It is a suspension bridge with one suspended span and several approach spans at both ends. The total length of the bridge is 1.6 km. The vertical clearance at the midspan is 64 metres. The bridge carries a motorway with six traffic lanes. A second bridge, called the *Fatih Sultan Mehmet Bridge* was built about 5 km north of the first one and opened to traffic in July 1988. It is also a suspension bridge. It has only one single span, the length of which is 1090 metres. The vertical clearance is 64 metres. The bridge carries a motorway with eight traffic lanes.

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[1] Law No. 30 of 2 May 1977 on the Territorial Sea. *UN Legislative Series, National Legislation and Treaties Relating to the Law of the Sea*, ST/LEG/SER.B/19, p. 56-57.

[2] K.C. Koh, *Straits in International Navigation. Contemporary Issues*, (1982), p. 17.

[3] Convention Regarding the Regime of the Straits, Montreux, 20 July 1936, 173 LNTS 213.

352. Like the Bosphorus, the Dardanelles Strait is also very narrow in relation to its length, which is about 70 km. So far there is neither a bridge nor a tunnel across this strait, though some information has been released suggesting that a bridge might be built in the future.

E. SCHELDE

353. Though a river, the Schelde (Westerschelde) is an interesting case because it forms a natural access from the Belgian town of Antwerp through the Netherlands to the North Sea. Though not, of course, identical, the situation of Belgium in respect of this river has an obvious similarity to Finland's situation in relation to the Danish straits.

354. Since 1988, negotiations have been held between Belgium and the Netherlands because of Belgian opposition to a Dutch plan to build a bridge with a vertical clearance of 54 metres over the river. According to Belgium, the plan would have created an effective obstacle for ships sailing between Antwerp and the North Sea.

355. The legal views expressed by the Government of Belgium are based in particular on Articles 108 to 117 of the Final Act of the Vienna Conference of 1815 concerning the freedom of navigation on international rivers, and on Article 9, paragraphs 1, 2 and 3 of the Peace Treaty concluded on 19 April 1839 by Belgium and the Netherlands. Belgium has further referred to the Mannheim Convention of 1868 concerning traffic of the Rhine[1].

Article 9, paragraph 3 of the 1839 Peace Treaty provides that no delay or hindrance of any kind shall be caused to ships sailing to Belgium on the Schelde river. The Government of Belgium interprets this provision to the effect that any bridge across the river would constitute such a hindrance. The Government of Belgium demanded at an earlier stage - when a bridge was still a probable alternative - that the bridge should be 90 metres in height or provided with an opening.

356. By August 1989, the Netherlands appears to have rejected the original bridge plan. The present intention is to build a bridge across a tributary of the river and a tunnel under the main river. The modalities of the proposed tunnel are still under discussion. The Government of Belgium wishes to conclude a treaty on the matter, while the Government of the Netherlands finds it sufficient that the conditions agreed are entered in the provisions of the concession which is given to the construction company.

Section IV. Conclusion

357. All of the bridges cited by Denmark in support of the alleged "international standard" are situated in internal waters. Almost all of them cross passages that lead only to the territory of the coastal State itself. If attention is directed to international straits, high seas corridors or other natural waterways of international importance, no fixed bridges are to be found, with the exception of the Bosphorus.

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[1] Cf. Act of the Congress of Vienna, Parry. *Consolidated Treaty Series*. Vol. 64 p. 453; Treaty between Belgium and the Netherlands relative to the Separation of their respective Territories, London 19 April 1839, *ibid* vol. 88 p. 427; Convention respecting the Navigation on the Rhine, Mannheim, 17 October 1868, *ibid*. vol. 138 p. 168.

358. Does the existence of the two Bosphorus bridges constitute an "international standard" of bridge clearance, opposable to Finland in the Great Belt? Surely not. In the first place, the Bosphorus lies entirely within internal waters, and passage rights in it are fully governed by an international Treaty (to which Finland is not a party). In the second place, there is no evidence of any existing navigation that would in fact have been hampered by the bridges at the time of their construction - unlike the case with the Great Belt, where established navigation would be prevented by the building of the bridge[1]. In the third place, it is hardly possible to generalize an internationally applicable standard out of one, idiosyncratic local situation - particularly in view of the complete absence of evidence of any *opinio iuris* to that effect.

359. If a broader view is taken of fixed links over natural waterways of international importance, two factual conclusions impose themselves. In the first place, there are no bridges over international straits situated in the territorial sea. Nowhere is the right of innocent or transit passage hampered by an existing bridge. Second, there are two cases in which an international strait is crossed by a tunnel (the Dover and Tsugaru straits). In respect of the Dover strait, the decision to opt for a tunnel was made partly at least because of the legal view that a bridge would have necessitated prior agreement with all the users of the strait.

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[1] In the past 20 years, no offshore craft have transited the straits. Cf. Annex 36 (Reply by Turkey's Ministry of Transport).

CHAPTER VIII
NEGOTIATING HISTORY

Section I. Before the Court's Order of 29 July 1991

360. Finnish concerns were drawn to the attention of the Danish authorities even before Finland was informed that Denmark had given up the tunnel alternative, available under the law of 1987 and communicated to foreign Embassies in the Danish Circular Note of 30 June 1987 (Annex 27). These concerns were made explicit in the letter from the Finnish Embassy in Copenhagen to the Danish Board of Navigation of 18 July 1989[1]. In a reply from the Danish Ministry of Foreign Affairs, dated 29 August 1989, it was affirmed that oil rigs and drill rigs that might extend to a height of 150 metres could not pass through the Great Belt once the planned bridge had been completed[2].

361. Thereafter, frequent contacts ensued. The matter was discussed in the consultations between the State Secretary of the Finnish Ministry for Foreign Affairs, Mr Wihtol, and the Director of Denmark's Ministry of Foreign Affairs, Mr Møller, in Helsinki on 20 September 1989. At that meeting, Mr Wihtol specifically repeated the Finnish concern about free passage in the Great Belt. Mr. Møller promised to look into the matter and to send any information he could receive on it from Copenhagen. On 6 October, pursuant to these talks, the chargé d'affaires of the Danish Embassy in Helsinki, Mr. Jørgen V. Andersen sent Mr. Wihtol a copy of the letter by the Danish Foreign Ministry which had been forwarded to the Finnish Embassy in Copenhagen already the previous August (cf. para 360 above.)[3]

362. Nevertheless, in October 1989 Finland was officially notified of the Danish choice of the bridge alternative with a navigational clearance of 65 metres[4].

363. The matter was then again taken up in the regular bilateral consultations on trade policy between the representatives of the Foreign Ministries of both countries which were held in Copenhagen on 5 February 1990. At this meeting, it was for the first time argued from the Danish side that the right of free passage does not apply to the kinds of offshore craft produced in Finland as these could not be held to be "ships".

364. Legal experts from both countries met on this particular issue at the Danish Ministry of Foreign Affairs on 15 May 1990. Again, the Finnish side repeated the view that the planned bridge would conflict with Finland's right of free passage. On the Danish side, it was responded that the project was intended to guarantee the rights of passage of all existing ships and that this excluded the offshore vessels which could not be classified as "ships".

365. A *Note Verbale* from the Finnish Embassy in Copenhagen to the Danish Foreign Ministry of June 1990 explicitly repeated the Finnish point of view[5]. Negotiations were suggested on how to guarantee the right of free passage in the Great Belt. The Danish Ministry replied in a *Note Verbale* of 11 July 1990 that the bridge project fulfilled the requirements of international law and that there was, therefore, no basis for negotiations[6]. Technical consultations were, however, suggested. These consultations took place in Copenhagen on 30 August 1990. The Finnish participants were told then that no review of the project was possible.

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[1] Annex 60.

[2] Annex 61.

[3] Annex 62.

[4] Annex 63.

[5] Annex 64.

[6] Annex 65.

366. In a further *Note Verbale* from Finland of 7 September 1990 it was suggested that further discussions on the matter should also include the legal issues posed by the Danish plans[1]. This suggestion was, however, rejected by Denmark[2].

367. Two meetings followed on 17 October 1990 and on 23 January 1991. The Finnish concerns were again repeated in a note of 5 November 1990[3] and in a letter by Finland's Minister of Foreign Trade, Mr. Pertti Salolainen, to his Danish Colleague, of 9 November 1990.[4] Many practical suggestions were put forward by Finland on how the present bridge project could be modified so as to guarantee the right of passage. All suggestions were - and have always been - rejected. The Danish side has relied heavily on the legal view that semi-submersible oil rigs, drill ships and jack-ups are not ships and that therefore they do not enjoy the right of passage.

368. Finally, on 6 February 1991, Finland's Prime Minister Mr Harri Holkeri, suggested to his Danish colleague that negotiations should start on how to accommodate the Finnish rights[5]. Denmark's Prime Minister, Mr Poul Schlüter, replied on 20 February 1991 that there was no possibility to modify the project at this advanced stage and that Finland had anyway reacted too late[6].

369. The Prime Ministers of Finland and Denmark, Mr Esko Aho and Mr Poul Schlüter met in Copenhagen on 25 June 1991. At this meeting, Mr Schlüter repeated his view that there was no possibility of modifying the bridge plan. He suggested, instead, that the semi-submersible oil rigs, jack-ups and drill ships that could not pass through the Great Belt might be disassembled and again reassembled when they had passed the bridge. The possibility of deepening the Sound was also mentioned.

Section II. After 29 July 1991

370. The Prime Ministers of Finland and Denmark met again in connection with the Nordic Prime Ministers' meeting in Reykjavik, Iceland, on 12 August 1991. At that meeting they agreed to set up a Working Group, headed by Mr Martti Ahtisaari, State Secretary of the Ministry for Foreign Affairs of Finland and Mr Ulrik Federspiel, Director of the Danish Ministry of Foreign Affairs. The Working Group was set up in pursuance of the statement by this Court in its Order of 29 July 1991 in which it welcomed "any negotiation between the Parties with a view to achieving a direct and friendly settlement"[7].

371. The Working Group agreed upon a mandate for a special technical Working Group. The Technical Working Group had the task of outlining technical alternatives concerning passage between the Baltic and the Kattegat by:

> "a) making proposals regarding technical solutions on the possibility and conditions of opening the West Bridge or the East Bridge;
> b) making a proposal for an alteration of the conditions of the Sound so as to allow passage that would otherwise be hindered through the Great Belt after the completion of the fixed link as planned;
> c) making any other technically feasible proposals."

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[1] Annex 66.

[2] Annex 67.

[3] Annex 68.

[4] Annex 69.

[5] Annex 70.

[6] Annex 71.

[7] *ICJ, Case Concerning Passage Through the Great Belt, Request for the Indication of Provisional measures, Order of 29 July 1991*, p. 20.

Each of the proposals was to be accompanied by a tentative estimate of the costs involved and of its technological feasibility.

372. The Report of the Technical Working Group was received on 15 October 1991.[1] The report contained no substantive proposals. Finnish and Danish technical experts were unable to find a mutually acceptable solution.

373. The Finnish side made several proposals regarding the opening of the West Bridge and the East Bridge. The Finnish side also observed that a tunnel solution could meet all the demands concerning free passage through the Great Belt. Due to lack of time, only suggestions for the opening of the East Bridge were considered. In the end, these suggestions proved unacceptable to the Danish experts.

374. The Danish experts suggested that the Finnish ships that could not use the Great Belt if the bridge were completed as planned could use the Sound (Drogden) instead. It was also suggested from the Danish side that the vertical clearance of the bridge could be increased by 3.8 metres. Neither of these suggestions was acceptable to the Finnish experts.

375. The most recent meeting between Mr Ahtisaari and Mr Federspiel met took place in Helsinki on 26 November. No substantive solution was attained at that meeting.

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[1] Annex 72.

PART III
THE LAW

CHAPTER I

THE RIGHT OF PASSAGE THROUGH THE GREAT BELT

Section I. Introduction

376. It is Finland's contention that the right of free passage through the Great Belt applies to all ships entering and leaving Finnish ports and shipyards including drill ships and MODU's and extends to reasonably foreseeable ship. It is this right, based, in Finland's contention, on existing and applicable rules of international law, whose existence Finland asks the Court to declare. These rules are both conventional and customary in nature. They all have in common, however, that they serve the purpose of protecting navigation in sea areas close to the coast, where the coastal State exercises its sovereignty. This is true in general as regards the territorial sea, and it is even more true in straits, which are those particular parts of the sea (and normally of the territorial sea) which link two parts of the high seas (or a part of the high seas to the territorial sea) and constitute therefore important and often irreplaceable passageways for international maritime traffic.

377. The right of passage claimed by Finland is based on rules set forth in various sources. None of these rules is such as to exclude, or to exclude wholly, the applicability of the others, and each of them - even taken separately - is sufficient to uphold the Finnish claim. The rules and the relationships between them will be examined first, in order to consider later why they are a basis for the Finnish claim.

Section II. Conventional rules

378. The conventional rules of law to be examined are the 1857 Copenhagen Treaty on the Redemption of the Sound Dues[1] and the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone. Customary law also has a role to play. The 1982 United Nations Convention on the Law of the Sea, even though not yet in force, is relevant from various points of view, as will be indicated.

379. The Treaty for the Redemption of the Sound Dues, done at Copenhagen on 14 March 1857, provides that the dues which were levied by Denmark on ships and cargo passing through the Sound or the Belts would be abolished in exchange for the payment of a lump sum by the Contracting Parties other than Denmark.

Article I, paragraph 1, after providing for the abolition of the dues, continues, in its French authentic text, as follows:

> " Aucun navire quelconque ne pourra désormais, sous quelque prétexte que ce soit, être assujeti au passage du Sund ou des Belts, à une détention ou entrave quelconque; mais Sa Majesté le Roi de Danemark se réserve expressément le droit de régler, par accords particuliers, n'impliquant ni visite ni détention, le traitement fiscal et douanier des navires appartenant aux Puissances qui n'ont pas pris part au present Traité."

This provision makes clear that the engagement of Denmark not to subject ships passing through the Sound and Belts to any détention or hindrance concerns all vessels, whether they belong to the contracting parties or not. The only reservation made by Denmark related to the fiscal and customs treatment of vessels belonging to non-Parties.

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[1] Annex 10.

The Parties to the 1857 Treaty were, apart from Denmark, the United Kingdom of Great Britain and Ireland, Austria, Belgium, France, Hanover, Mecklemburg-Schwerin, Oldenburg, the Netherlands, Prussia, Russia, Sweden and Norway, the Hanseatic Towns of Lübeck, Bremen and Hamburg.

380. Finland, then a Grand-Duchy of Russia, was not as such a Party, even though the Grand Duchy of Finland contributed 400,000 roubles in silver to the payment by Russia of its part of the compensation due to Denmark under the Copenhagen Treaty. [1]

381. The right of passage without détention or hindrance is provided for in the formulation of Article I, paragraph 1 of the Treaty, for the benefit of all States. This interpretation is confirmed in an intervention at the first United Nations Conference on the Law of the Sea by the Danish representative, Mr. Sørensen. He said that: "Part of the Danish coast bordered an international strait joining two parts of the high seas, and for more than one hundred years his country had maintained freedom of navigation through such strait in the interests of international trade."[2]

Thus, the rights provided by the Treaty being accorded to all States, Finland can be considered - *inter alia* according to Article 36 of the Vienna Convention on the Law of Treaties - as a third party beneficiary of the Copenhagen Treaty. This has been accepted by Denmark in its pleadings before the Court on the Indication of Provisional Measures in the present case[3].

382. The position of Finland in relation to the Copenhagen Treaty may also be based on considerations different from those connected with the law of treaties. It might be argued that the 1857 Treaty of Copenhagen creates an objective regime, in other words a set of rules which may be invoked by all interested states, independently of their being parties to the treaty. This was the opinion of the International Committee of Jurists established in 1920 by the Council of the League of Nations to advise it on the claim put forward by Sweden against Finland to the demilitarization of the Åland Islands. This claim was based on a Convention concluded on 30 March 1856 between France and Great Britain on the one hand, and Russia on the other. The International Committee of Jurists advised that even though Sweden was not a party, it could claim that Finland was bound to abide by the rules on demilitarization of the Islands. The Committee said that:

> "The provisions [of the 1856 Treaty] were laid down in European interests. They constituted a special international status, relating to military considerations, for the Åland Islands. It follows that until these provisions are duly replaced by others, every State interested has the right to insist upon compliance with them. It also follows that any State in possession of the Islands must conform to the obligations binding upon it, arising out of the system of demilitarization established by these provisions."[4]

It does not matter very much in the present context whether one speaks of an "objective regime", of a "settlement regulating European interests", or of a "real political status the effects of which are felt outside the immediate circle of contracting Parties". All these expressions are contained in the Report of the Committee of Jurists[5]. What counts is that in

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[1] Annex 20.

[2] Annex 73.

[3] Statement by the Counsel of Denmark, Dr. Jiménez de Aréchaga on 2 July 1991.

[4] League of Nations, *Official Journal*, Special Supplement no. 5, October 1920, p. 19. (conclusions of the International Committee of Jurists).

[5] *Ibid.*, pp. 17-18.

1920 Finland was held bound by an obligation based on a treaty to which it was not a party and - more remarkably - in relation to a claimant State that also was not a party to the treaty. In Finland's opinion the obligations assumed by Denmark under the Treaty of Copenhagen (concluded just one year after the Treaty on the Åland Islands) are similar in nature to those assumed by Russia (and held applicable to Finland as successor in the exercise of sovereignty over the Åland Islands) as regards the demilitarization of the Åland Islands. The importance of the Danish Straits for the political balance in the Northern part of Europe, and in particular in the Baltic area, is evident. The indication by Denmark, quoted in the preceding paragraph, of the "interests of international trade" as a reason for Denmark maintaining freedom of navigation through the straits for over one hundred years clearly points in the same direction. Consequently Finland is entitled to invoke the provisions of the Copenhagen Treaty independently of its position as a third party beneficiary.

383. The Convention on the Territorial Sea and the Contiguous Zone, adopted at Geneva on the 29 April 1958, was ratified by Finland on 16 February 1965 and by Denmark on 26 September 1968. Consequently, under Article 29 paragraph 2 of that Convention, it entered into force between the two Parties as from 25 October 1968.

That Convention contains rules on the innocent passage of foreign ships through the territorial sea. It only mentions straits used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State once, in Article 16 paragraph 4. According to this provision "there shall be no suspension" of innocent passage through such straits.

According to Article 25 of the 1958 Convention, "the provisions of this Convention shall not affect conventions or other international agreements already in force, as between States Parties to them".

Section III. The relationship between the Copenhagen Treaty of 1857 and the Geneva Convention of 1958

384. As far as treaty law is concerned passage through the Great Belt is thus regulated - as between Denmark and Finland - by the 1958 Geneva Convention, to which both States are parties, and by the 1857 Copenhagen Treaty, whether because Finland is a third Party beneficiary or on the basis of an existing objective regime.

What is the effect, in the light of this position of Finland, of Article 25 of the Geneva Convention, quoted above, according to which the provisions of the Geneva Convention "shall not affect conventions or other international agreements already in force, as between States Parties to them"?

Some doubts might be raised as to whether a third party beneficiary can be considered as a State Party for the purposes of Article 25. Whatever doubt may be raised in the abstract, the fact that as recently as in 1991 Denmark has considered Finland a third party beneficiary means that according to Denmark - which is the only State having obligations concerning passage through the Great Belt under the 1857 Treaty - Finland can invoke the rights deriving from the Treaty of Copenhagen notwithstanding the fact that the Geneva Convention is in force between Denmark and Finland. The construction mentioned above of the Copenhagen Treaty as creating an objective regime confirms this conclusion.

Section IV. The regime of passage through the Great Belt: The changing Danish view

385. The Danish position as regards the rules applicable to passage through the Great Belt has been far from consistent over the years. It is nonetheless clear that, up to the beginning of the present case, the rule on passage without détention or hindrance provided for in the Treaty of Copenhagen of 1857 has been seen by Denmark as a part of, or as the basis of, a regime of which customary law is a component.

386. In 1929, in responding to a questionnaire prepared in view of the League of Nations' Conference for the Codification of International Law, Denmark indicated its position on the regime of passage in the Sound and Belts as follows:

> "The Treaty of March 14th, 1857, for the redemption of toll dues on the Sound and the Belts is regarded by the Danish Governement as having been primarily intended to abolish the special rules previously in force in these waters - in particular, the collection of the dues known as the "Sound dues" - and to bring these waters henceforward under the general rules of international law relating to straits connecting two portions of the open sea."[1]

387. In his intervention at the first United Nations Conference on the Law of the Sea, quoted above, Mr. Sørensen, speaking on behalf of Denmark, having recalled that Denmark had maintained freedom of navigation through the Danish straits in the interest of international trade for over one hundred years, stated that:

> "such an obligation as that which his country had assumed should be counterbalanced by corresponding rights in other parts of the world, and Denmark accordingly expected that there would be free passage for its ships through straits in the territorial seas of other States."[2].

388. In the interventions at the Third United Nations Conference on the Law of the sea, Denmark presented yet a different position.

Intervening in Plenary at the beginning of the Conference, the Danish Representative Mr. Fergo, emphasised that in some narrow straits, "a special regime had developed over the years based on treaties, custom and the coastal State's national legislation, and adapted to local conditions. Transit through the international straits leading into the Baltic, for example, was so regulated, on the basis of the Copenhagen Convention of 1857. Such special arrangements which had proved their value over the years and served the interests of coastal States and the international community should be maintained[3]."

The same Danish representative referred again in another intervention to the "special regime serving the interests of both the coastal state and the international community" [4].

Another Danish diplomat, who also served as representative of his country to the Third United Nations Conference on the Law of the Sea, Ambassador Ib R. Andreasen, affirmed in an intervention at an academic meeting that the provision of the Copenhagen Treaty according to which no vessel shall be subject in its passage through the Sound or Belts to any détention or hindrance, "is an expression of a regime of passage through straits" and that "in the Danish straits a special regime of passage adapted to local conditions has been developed over the years based on the Copenhagen Convention of 1857, international customary law, and national regulation".[1]

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[1] League of Nations, *Conference for the Codification of International Law, Bases of Discussion*, vol. II - C.74.M.39. 1929, p. 13. See Annex 12.

[2] *United Nations Conference on the Law of the Sea, Official Records*, vol. II, p. 65. See Annex 73 to the present Memorial.

[3] Annex 74.

[4] Annex 75.

389. The opinion that what applies to the Danish straits is not a treaty but a "regime" emerges also from the fact that Denmark considers that Article 35 (c) of the United Nations Convention on the Law of the Sea applies to the Danish straits and from the contents of that Article. This point was made explicitly by the leader of the Danish delegation, Ambassador Peter Brückner, in intervening at the Plenary of the Third U.N. Law of the Sea Conference on 31 March 1982: "His delegation was satisfied that Article 35(c) applied to the specific regime in the Danish straits, a regime which had developed over the years on the basis of the Copenhagen Convention of 1857."[2]

Indeed, Article 35(c) of the Convention clearly aims at safeguarding something different from mere treaty obligations. This appears clearly if one compares this provision with Article 25 of the Geneva Convention on the Territorial Sea and the Contiguous Zone, quoted above. The 1982 provision provides that the new Convention's Part III on Straits shall not affect, "the legal regime in straits in which passage is regulated in whole or in part by long-standing international conventions in force specifically related to such straits". The 1982 provision speaks of a "legal regime", and not, as does that of 1958, of "conventions or other international agreements". It specifies that the conventions must be "specifically related" to the strait in question, and omits to say that the conventions must be in force between the Parties.

Moreover, the 1982 provision considers conventions which regulate passage through the straits *in whole or in part*. Consequently, if one accepts the view that the Copenhagen Treaty does not cover all aspects of passage through the Danish straits (as Denmark seems to have maintained through the various phases of its thinking on the regime of the Straits), rules on aspects of passage not regulated by the Treaty are seen as remaining unaffected.

390. The position of Denmark as to the "regime" of the Danish straits changed once again in 1991, as emerges from the Danish Written Observations and from the Danish pleadings during the discussion of Finland's Request for provisional measures in the present case. On this more recent occasion the applicable law was indicated by Denmark to consist exclusively of the Geneva Convention and the 1857 Treaty of Copenhagen in respect of which Finland was, according to Denmark, a third party beneficiary.[3] The concept of "regime", upon which Denmark had insisted so much during the Third United Nations Conference on the Law of the Sea, was absent in these pronouncements. The relevance of customary law, also often mentioned on previous occasions by Denmark, was excluded.

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[1] "Commentary", *The Law of the Sea in the 1980s, Proceedings of the Law of the Sea Institute, 14th Annual Conference, October 20-23, Kiel, Germany,* (ed.) Choon-ho Park, (1983) pp. 600-601.

[2] Annex 76. See also the intervention made on behalf of Denmark by Mr. Mellbin on 27 August 1980, *ibidem*, vol. XIV, p. 61. Annex 77.

[3] Danish Written Observations of 28 June 1991, paras. 96-123. See also statement by the counsel of Denmark, Dr. Jiménez de Aréchaga.

Section V. The role of customary law

391. The view of Finland as regards the law applicable to passage through the Danish straits and in particular through the Great Belt is, broadly speaking, similar to that held by Denmark during the Third United Nations Conference on the Law of the Sea: passage through the Danish straits is indeed a specific regime, the components of which are the above mentioned treaty provisions as well as rules of customary law.

What precisely is the role of customary law in the shaping of this regime?

392. Such a role can be seen, firstly, if one considers that the rules contained in the Treaty of 1857 have now become rules of customary law. This is the case for the rule that excludes all forms of customs or dues for passage in the Sound or Belts "for ever". Article 18, paragraph 1, of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, repeated in Article 26, paragraph 1, of the United Nations Convention on the Law of the Sea of 1982, states that, "No charge may be levied upon foreign ships by reason only of their passage through the territorial sea".

Furthermore, the rule providing for the right of passage without any hindrance or détention has become a customary law rule. In the many decades of its application Denmark has never invoked the fact that certain ships passing through the straits fly the flag of a State party to the Copenhagen treaty in order to treat them differently from ships of States that are not parties to the Treaty. Certainly, no such distinction was even hinted at in the notes sent by the Danish Ministry of Foreign Affairs on the plans for a fixed link to all the Embassies in Copenhagen.

393. Secondly, the developments concerning the notion of innocent passage arising from the United Nations Convention on the Law of the Sea of 1982 are not without consequence for the customary law notion of such passage, and also for the interpretation of that notion as envisaged in the 1958 Convention on the Territorial Sea and the Contiguous Zone. This is true, in particular, as regards the listing of activities, set forth in Article 19 paragraph 2 of the 1982 Convention, which "shall be considered to be prejudicial to the peace, good order or security of the coastal state". As is well known, the Geneva Convention says only that "passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State" (Article 14, paragraph 4). Similarly, the listing in Article 21 of the 1982 Convention of the subjects relating to which the coastal State "may adopt rules and regulations ...relating to innocent passage through the territorial sea", can be seen as an authoritative indication of these subjects from the perspective of customary law as well as from that of the interpretation of Article 17 of the Geneva Convention, which mentions, in general terms, the coastal State's laws and regulations.

Indeed, two important States parties to the Geneva Convention, the United States and the Soviet Union, have recently jointly stated that, "the relevant rules of international law governing innocent passage of ships in the territorial sea are stated in the 1982 United Nations Convention on the Law of the Sea..., particularly in Part II, section 3", and specified that the list of activities which would render passage non-innocent, set forth in Article 19 of the 1982 Convention, is "exhaustive" and that the rules of international law in conformity with which the coastal State must adopt any laws and regulations are "reflected" in Articles 21, 22, 23 and 25 of the same Convention[1].

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[1] Annex 78.

Moreover, domestic legislation on innocent passage has already started to reflect the listings in the 1982 Convention (see, for instance, the Bulgarian Law of 8 July 1987,[1] and note that Bulgaria is a party to the Geneva Convention on the Territorial Sea and the Contiguous Zone) or to make reference to the Convention of 1982, as does , for instance, the Ghanaian Maritime Zones (Delimitation) Act of 1986.[2]

394. Thirdly, there are strong trends in international practice towards the establishment of a customary international law rule on passage through straits making such passage independent of the notion of "innocent passage".

This trend is evidenced by the acceptance of the notion of "transit passage" through straits used for international navigation at the Third United Nations Conference on the Law of the Sea and by the fact that this notion has been indicated by some States , unilaterally or in treaties, as being part of customary law.

One may recall, in particular, that the President of the United States in his Proclamation on the territorial sea of 27 December 1988 stated that, "In accordance with international law, as reflected in the applicable provisions of the 1982 Convention on the Law of the Sea...the ships and aircraft of all countries enjoy the right of transit passage through international straits"[3]. Similarly, in a Joint Declaration of 2 November 1988, the Governments of France and of the United Kingdom affirmed that,

> "The existence of a specific regime of navigation in straits is generally accepted in the current state of international law"

and that

> "the two Governments recognize rights of unimpeded transit passage for merchant ships , state vessels and, in particular, warships following their normal mode of navigation, as well as the right of overflight for aircraft, in the Straits of Dover"[4].

In its decree-law No. 14/78 Sao-Tôme-et-Principe affirms that

> "shall respect freedom of navigation in and overflight of straits or sealanes used for international navigation"[5].

In Article 5, paragraph 2, of the South Pacific Nuclear-Free Zone Treaty, signed at Rarotonga on 6 August, 1985, "transit passage of straits" is mentioned in such a way that no doubt is left that the treaty parties consider it as a concept belonging to existing international law[6].

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[1] *United Nations Office for Ocean Affairs and the Law of the Sea, The Law of the Sea, Current Developments in State Practice No. II*, New York, 1989, p. 3 et seq., Art. 20.

[2] *United Nations Office of the Special Representative of the Secretary-General for the Law of the Sea, The Law of the Sea, Current Developments in State Practice*, New York, 1987, p. 33 et seq., Art. 2, sec. 1.

[3] *United Nations, Office for Ocean Affairs and the Law of the Sea, The Law of the Sea, Current Developments in State Practice, No. II*, New York, 1989, p. 83.

[4] Annex 58.

[5] In 2 *United Nations Law of the Sea Bulletin*, (December 1983) p. 73.

[6] "Each Party in the exercise of its sovereign right remains free to decide for itself whether to allow visits by foreign ships and aircraft to its ports and airfields , transit of its airspace by foreign aircraft, and navigation by foreign ships in its territorial sea or archipelagic waters in a manner not covered by the *rights* of innocent passage, archipelagic sea-lanes passage or *transit passage of straits*" (underlining added). (United Nations, Office of the Special Representative of the Secretary-General for the Law of the Sea, *The Law of the Sea, Current Developments of State Practice*, New York, 1987, p. 192.)

The "right of passage in transit" is also mentioned in the Boundary Delimitation Treaty concluded on 31 March 1978 between Venezuela and the Netherlands (Article 4)[1].

In Article 7 of the Agreement between Australia and Papua New Guinea of 18 December 1978 a regime of passage through the Torres Straits is declared applicable which should not be more restrictive than that of transit passage provided for in the relevant articles of the then most recent Informal Negotiating Text of the Third United Nations Conference on the Law of the Sea. The Article adds that "if the provisions of those articles are revised, are not included in the Law of the Sea Convention or fail to become generally accepted principles of international law" the parties would consult in order to agree on another regime.[2] No such consultation has occurred and the parties have ratified the Agreement in 1985, making it legitimate to conclude that they consider transit passage to be a generally accepted principle of international law.

395. These examples from the practice of States of various regions of the world indicate that there is evidence of an emerging principle on "transit passage" through straits, notwithstanding the fact that a number of States (albeit a small and a diminishing number) still hold a different view.

Perhaps such an emerging principle does not include all the details set forth in the United Nations Convention on the Law of the Sea. The manifestations of practice considered above would seem, however, sufficient support in any case for the view that present day customary law on passage through straits does not correspond any longer with the prescriptions of the Geneva Convention on the Territorial Sea and the Contiguous Zone, or with any restrictive interpretation thereof.

396. It is significant from the point of view of customary law that although thousands of ships have passed and pass every year through the Danish straits, neither Denmark nor the flag States of these ships have ever indicated that this passage is *ex gratia*. It is a passage based on law, on an obligation of Denmark. No distinction has ever been made between passage based on the Geneva Convention, on the Copenhagen Treaty or on general international law. This seems to indicate that all the above-mentioned sources merge, in their application to passage through the Danish Straits, into a general rule of freedom of passage.

Section VI. Customary Law and Article 35 (c) of the Law of the Sea Convention of 1982

397. Special provision is made in the 1982 United Nations Convention on the Law of the Sea for straits which are the subject of long-standing international treaties. Indeed, Finland was an active proponent of that provision. Article 35(c) provides that nothing in Part III of the 1982 Convention, on straits used for international navigation, shall affect "the legal regime in straits in which passage is regulated in whole or in part by long-standing international conventions in force specifically relating to such straits".

398. One interpretation of this provision is that, whatever the true impact of the concept of transit passage through straits in customary law, passage through the Danish straits is sheltered from such impact by Article 35(c). Such an interpretation is, however, of doubtful validity in the present state of the law. The United Nations Convention on the Law of the Sea of 1982 is not in force. Consequently, no problems concerning conflicts between the

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[1] In United Nations, Office for Ocean Affairs and the Law of the Sea, *The Law of the Sea, Maritime Boundary Agreements (1970-1984)*, New York, 1987, p. 139.

[2] The text of the agreement is in 8 *International Legal Materials*, 1979, p. 291.

treaty provisions contained in it and other rules of international law can arise before the Convention, including Article 35, becomes binding for the parties as a treaty.

399. The question of the influence on customary law of the rules set forth in the Convention is different. The International Court of Justice has stated that even if two norms belonging to two sources of international law appear identical in content, and even if the States in question are bound by these rules both on the level of treaty-law and on that of customary international law, these norms retain a separate existence.[1] Can it be said that the existence of Article 35 (c) in the 1982 Convention, considered in its present status as a document not yet binding as a treaty, is such as to preclude any repercussion on the customary law trend towards the consolidation of a regime of passage through international straits similar, in its broad outline, to that of "transit passage"? In Finland's opinion such repercussions cannot be excluded, at least as regards passage of ships other than warships.

Even were the contents of Article 35(c) considered to be inseparable from whatever customary rule has emerged in correspondence with the concept of "transit passage", this would not exclude the impact of such a rule on the regime of the Danish Straits. Similarly, - it is submitted - were the 1982 Convention to enter into force, Article 35(c) would not preclude such impact of the "transit passage" rules of the Convention. The reason is that the regime applicable to the Danish Straits includes a customary law component which remains open to influence from the general rules of international customary law. Such a possibility was taken in consideration by the drafters of the 1982 Convention, when they made reference in paragraph 35(c) to long-standing conventions regulating passage through straits in whole or in part.

400. The importance of the customary component of the legal regime of the Danish straits depends on how comprehensive the treaty law rules, and notably the rule on passage of the 1857 Treaty, are considered to be. It is well known that views differ on this point. According to some, the treaty of Copenhagen "n'a pas établi un régime particulier pour les détroits danois - son seul but étant de faire disparaître une entrave à la navigation - et par consequent ces passages sont soumis au régime général des détroits internationaux"[2] As is noted above, this position was also held by Denmark in its reply to a questionnaire sent in preparation for the League of Nations Conference of 1930 for the Codification of International Law.

Similar is the position held by the Danish professor E. Brüel in his treatise on International Straits[3], as well as, more recently, by the Danish author S. Lassen[4] and by the German professor W. Graf Vitzthum.[5]

Others hold the view that the 1857 Treaty is the principal legal basis of the right of passage of ships (or at least of ships other than warships) through the Danish straits. This position has been taken recently by the German scholar H. Löschner[1]. The position held by Denmark at the Third United Nations Conference on the Law of the Sea and mentioned before may come close to this view.

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[1] Military and Paramilitary Activities in and against Nicaragua *(Nicaragua v. United States of America), Merits, Judgment, ICJ Reports 1986*, p. 95, para. 178.

[2] R. Lapidoth, *Les détroits en droit international*, (1972), p. 112.

[3] Erik Brüel, *International Straits*, (1947), vol. II, pp. 40-41.

[4] "Passage through Straits. An Analysis of the Conflict between the General Interest in Free Navigation and the Particular Interest of the Starit States in Controlling the Pollution Threat Posed by the Wreck of Oil Tankers as illustrated by the Danish Straits Controversy", 47 *Nordisk Tidskrift for International Ret* 1978, p. 93 et seq., espec. 99-100 .

[5] "The Baltic Straits", *The Law of the Sea in the 1980s*, Proceedings Law of the Sea Institute 14th Annual Conference, *Kiel, 1980*, (ed.) Choon-ho-Park, p. 537 et seq., espec. p. 565.

Section VII. The regime of passage and the Finnish claim

401. It has been shown that the regime of passage through the Great Belt is the result of a combination of rules emerging from various sources, and that the precise relationship between these sources may be the object of debate, even though it seems certain that the Treaty of Copenhagen and customary rules have a particular importance in the shaping of the regime.

As regards the right claimed by Finland it is not necessary, however, to determine exactly what is the relationship between these various rules. Each of them, even taken separately, provides sufficient support for such right.

402. It is sometimes argued that in certain respects the rules on innocent passage set forth in the Geneva Convention on the Territorial Sea and the Contiguous Zone are more restrictive than those on transit passage contained in the United Nations Convention on the Law of the Sea of 1982, and this point could be made also as regards the customary law reflection of these rules. It must be considered, nonetheless, that often the criterion for considering one rule of international law concerning passage to be more or less restrictive than another is whether, or under what conditions, passage of warships is permitted. This seems to be the criterion adopted by Denmark in the *Written Observations* it presented during the discussion of the request for provisional measures in the present case[2]. This question is not relevant for the purposes of the present dispute, and should not influence the assessment by the Court of the character of the rule concerning passage.

Section VIII. Passage for all ships

403. All the varying rules of international law to which attention has been drawn obligate Denmark to ensure passage of ships of all States through the Great Belt. No exception is made for any particular kind of ship, apart from warships. Indeed the rules under consideration envisage ships different from warships (as well as, in recent times, government-owned ships not used for commercial purposes), as a general residuary category.

404. This emerges clearly if one examines the structure of the provisions on innocent passage in the Geneva Convention on the Territorial Sea and the Contiguous Zone of 1958 as well as the structure of the corresponding provisions of the 1982 United Nations Convention on the Law of the Sea. In these provisions, "warships" and "other government ships" are clearly identified, while the other ships, although called "merchant" ships in the title of sub-section B of section III of the Geneva Convention and of sub-section B of section III of Part II of the 1982 Convention, are seen as a single category, without any reference to their nature or function. Indeed, the rules applicable to them, but not to warships and other government ships operated for non-commercial purposes, refer to "foreign ships" (Articles 18, 19, 20 of the Geneva Convention, 27 and 28 of the 1982 Convention).

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[1] "Shipping Routes to and within the Baltic Sea", 30 *Außenpolitik* 1979, p. 174 et seq., espec. pp. 278-279.

[2] Danish Written Observations of 28 June 1991, paras. 110-111.

405. The Treaty of Copenhagen of 1857 also envisages all ships and not only "merchant" ships according to the most restrictive meaning of the term, although it probably excludes warships, which it does not mention. In its pleadings before the International Court of Justice in the hearings on the request for provisional measures in the present case, Denmark held the opposite view[1]. According to Denmark, the provisions of the treaty "have in mind merchant vessels", because the Treaty refers to "foreign ships and their cargoes" and to "commercial relations". This argument does not, however, into account the following two aspects of the treaty: that the preamble mentions, just after the statement of the purpose of increasing "commercial relations", that of increasing "maritime relations"; and that the dues on ships and on cargoes were then separate.

As explained by the Danish Commissioner during the negotiation of the 1857 Treaty, the dues "were of two kinds, namely the Sound dues which are levied on merchandize...and the dues levied upon shipping, which are also of two classes, the one under the name of Light dues being set apart for the maintenance of the lighthouses and buoys in the Sound and Belts, and the other called "Expedition dues", being fees levied for the purposes of defraying the expenses of the Customhouse."[2] The dues levied on shipping depended on the fact of passage. At least as far as the Light dues are concerned, there can be no doubt that what counted was the fact of navigation through the Sound and Belt, and of utilizing the lighthouses and buoys, and not that the ship was engaging in trade.

406. International law has never limited rights of passage through territorial seas and straits to an exclusive category of beneficiaries, whether defined as ships, vessels, or otherwise. Rather, rights of passage have themselves been conceived in a functional sense, according a right of navigation to all craft which navigate upon the sea. This functional approach to the definition of rights of passage is so fundamental as to pervade the entire body of juristic writing and practice, rather than being confined to specific provisions in texts on the subject. Thus, for example, it was stated in one of the prominent texts of the early part of this century that:

> "In all cases in which territorial waters are so placed that passage over them is either necessary or convenient for the navigation of open seas, as in that of marginal waters, or of an appropriated strait connecting unappropriated waters, they are subject to a right of innocent use by all mankind for the purposes of commercial navigation... [F]or more than two hundred and fifty years no European territorial marine waters which could be used as a thoroughfare, or into which vessels could accidentally stray or be driven, have been closed to commercial navigation; and since the beginning of the nineteenth century no such waters have been closed in any part of the civilised world. The right therefore must be considered to be established in the most complete manner." [Footnotes omitted.][3]

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[1] Statement by the counsel of Denmark, Dr. Jiménez de Aréchaga, 2 July 1991.

[2] Report of the Minister of Great Britain to the Court of Denmark on the Negotiations on the redemption of the Sound dues, 22 March 1857. Martens, *Nouveau recueil général des traites*, 2ème series, Tôme XVI, p. 331 et seq., at p. 332, reporting on the explanations on the dues given by the Danish representative.

[3] W.E. Hall, *A Treatise on International Law*, 8th ed (ed., A. Pearce Higgins), (1924), pp. 197-198. To similar effect see, e.g, F. Perels (trans. L. Arendt), *Manuel de droit maritime*, (1884), p. 97; T.E. Lawrence, *The Principles of International Law*, 7th ed (ed., Percy H. Winfield) (1924) pp. 181-183 ["...the common law of nations now imposes upon all maritime States the duty of allowing a free passage through such of their territorial waters as are channels of communication between two portions of the high seas"]; A.S. de Bustamante y Sirven (trans. P. Goulé), *La mer territoriale* (1930), para. 181; J. Hostie, "Examen de quelques règles du droit internationale dans le domaine des communications et du transit", 40 *Recueil des Cours* (1932 II), p. 462; G. Gidel, *Le droit international de la mer*, vol. 3 (1932), pp. 201 et seq.

Section IX. The contents of the various rules

407. The sweeping affirmation of the Treaty of 1857 that passage shall not be hindered or hampered should be interpreted as creating a very general and very liberal regime of passage. This is confirmed by the observation made by Max Sørensen in his declaration as legal advisor to the Danish Foreign Ministry of 4 February 1957[1], where he emphasises that with the word "entrave", contained in the above quoted Article 1, paragraph 1, sentence 2, the Treaty

> "...presumaby excludes not only an absolute hindrance but every measure that can render passage difficult".

408. Whatever the position may be on the scope of the Copenhagen Treaty, the rules on "innocent passage" require more detailed examination because, at least during the discussion of the request for provisional measures in the present case, Denmark relied on them, arguing that they are more restrictive than those on transit passage and that they are formulated in such a way as not to give support to the Finnish claim.

Whether these rules can be labeled as more restrictive than others is not relevant. What is important is whether the Finnish claim can be based on them. If one analyzes the rules on innocent passage it emerges that they support four basic propositions, which are such as to give full support to the Finnish claim. These propositions are the following:

1) The innocence of passage is clearly defined.
2) Ships exercising the right of innocent passage shall comply with the laws and regulations of the coastal State which must, however, be confined to certain subjects.
3) Passage not in conformity with the coastal State's laws and regulations is not, as such, "non-innocent"
4) The coastal State must not hamper or deny or impair innocent passage.

409. As regards the first proposition, while "passage", according to Article 14, paragraph 2, of the Geneva Convention on the Territorial Sea and the Contiguous Zone, "means navigation through the territorial sea for the purpose either of traversing that sea without entering internal waters, or of proceeding to internal waters, or of making for the high seas from internal waters", it is "innocent" , according to paragraph 4 of the same Article, " so long as it is not prejudicial to the peace, good order or security of the coastal State".

As has been seen, the 1982 Convention gives a list which, as said before, reflects the present trend in customary law and can serve as an interpretation of the Geneva Convention - of activities which render passage prejudicial to the peace, good order and security of the coastal State, and consequently not innocent (Article 19 paragraph 2[2]). If one reads this list it appears clearly that none of the activities included in it has any connection whatsoever with the passage of MODUS or other tall ships. This passage is not, as such, non-innocent.

410. Coming to the second proposition, ships exercising the right of innocent passage shall, according to Article 17 of the Geneva Convention, "comply with the laws and regulations enacted by the coastal State in conformity with these articles and other rules of international law and, in particular, with such laws and regulations relating to transport and navigation". Similarly, the 1982 Convention, in Article 21, paragraph 4, provides that foreign ships exercising the right of innocent passage shall comply with all laws and regulations adopted by the coastal States on the subjects listed in paragraph 1 of the same Article.

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[1] Annex 19.

[2] Annex 79.

The list[1] does not contain any item which would as such permit interference with the passage of MODUS and other tall ships apart from the aspect, mentioned in subparagraph (a) of "safety and navigation and the regulation of maritime traffic". Moreover, these laws and regulations "shall not apply to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules and standards" (paragraph 2 of Article 21). According to Article 22 the coastal State especially as regards "tankers, nuclear powered ships and ships carrying nuclear or other inherently dangerous or noxious substances" - may require that ships use sealanes or traffic separation schemes it may designate or prescribe. As was indicated before, the more detailed indications of the 1982 Convention are influencing customary law and can be used in order to interpret the Geneva Convention.

411. As to the third proposition, that passage not in conformity with these laws and regulations is not automatically to be considered as "non innocent", it is corroborated by Article 17 of the Geneva Convention, reproduced above. In prescribing compliance with the coastal State's laws and regulations, this Article envisages ships "exercising the right of innocent passage". The United Nations Convention on the Law of the Sea of 1982 confirms the same proposition, as it specifies that the coastal State's laws and regulations must relate "to innocent passage through the territorial sea" (Art.21). Moreover, Article 14, paragraph 4, of the Geneva Convention confirms this point *a contrario*, as it provides that passage by fishing vessels "shall not be considered innocent if they do not observe such laws and regulations as the coastal State may make and publish in order to prevent such vessels from fishing in the territorial sea".

412. Coming now to the fourth and last proposition - that the coastal State must not hamper or deny or impair innocent passage - according to the Geneva Convention, while the coastal State may "take the necessary steps in its territorial sea to prevent passage that is not innocent" (Article 16), as long as passage is innocent the coastal State "must not hamper" it (Article 15, paragraph 1). The 1982 Convention repeats that the "coastal state shall not hamper the innocent passage of foreign ships through the territorial sea" and specifies that "in particular, in the application of this Convention or of any laws or regulations adopted in conformity with this Convention, the coastal State shall not...impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage" (Article 25, paragraph l-a).

As passage of MODUS and other tall ships is, as such, innocent, it must not be hampered, denied or impaired by the coastal State.

413. The rules on transit passage in the United Nations Convention on the Law of the Sea, while formulated in such a way as to give less discretion to the coastal State, permit the formulation of similar propositions. Transit passage is clearly defined (Article 38, paragraph 2). Foreign ships exercising the right of transit passage shall comply with the laws and regulations "relating to transit passage" adopted by the States bordering straits; but these laws and regulations are to be confined to certain subjects (Articles 42 and 43). Passage not in conformity with the abovementioned laws and regulations is not per se outside the scope of transit passage (Article 42, on "laws and regulations of States bordering straits *relating to transit Passage*"). States bordering straits shall not hamper transit passage, and their laws and regulations shall not have the practical effect of denying, hampering or impairing the right of transit passage (Articles 44 and 42, paragraph 2) .

414. The developments above indicate that according to all the rules that may apply to passage through the Great Belt there exists - leaving aside the question of warships - a right

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[1] Annex 79.

of passage for all ships, which Denmark, as the State bordering the strait, cannot hamper or in any way deny - as in fact it has never hampered or denied it. Denmark can adopt regulations concerning such passage. These regulations cannot, however, have the practical effect of making passage impossible.

415. The complex nature of the regime of passage through the Great Belt, which, as has been indicated, is based on rules of various origins and nature, makes irrelevant one line of reasoning put forward by Denmark in the discussion of the Request for provisional measures in the present case. According to this line of reasoning[1], as the States parties to the Copenhagen Treaty have accepted the clearance of 65 meters by their lack of reaction to the Danish Circular Note announcing the intention of building a bridge of such clearance, Finland could not claim a right of passage extending to ships taller than 65 meters, because, as a third party beneficiary it would not be entitled "to invoke additional rights or a more favorable treatment than the one agreed to by the actual parties to the 1857 Treaty".[2]

This line of reasoning applies - if at all - only as far as the 1857 Copenhagen Treaty is concerned. As has been seen, the regime of passage through the Great Belt is based only partially on that treaty, and consists of rules of customary and treaty origin each of which is sufficient to support the Finnish claim. Obviously, the rights Finland enjoys on the basis of these rules do not depend in any way on the attitude of other States.

Even within the narrow framework adopted by Denmark namely that of the rights of Finland are those of a third party beneficiary of the Copenhagen Treaty - the line of reasoning here considered is not beyond objection. The right of passage includes all existing ships, and consequently also tall Finnish ships. This is the right (derived, for the purposes of the present discussion, from the 1857 Copenhagen Treaty) of which Finland is a third party beneficiary. This right can be revoked or modified by the parties, according to Article 37, paragraph 2, of the Vienna Convention on the Law of Treaties (unless agreement to the contrary can be established). But, it is submitted, a series of consents (moreover tacit) by treaty parties not to object to a modification planned by another treaty party to the factual situation in which the right is exercised is not equivalent to the parties revoking or modifying a right that has arisen for a third party: an agreement to that effect seems to be necessary, and evidence of this, in the present case, is missing.

Section X. MODUS as "ships with special characteristics"?

416. In the pleadings before the International Court of Justice on the request for provisional measures in the present case[3] Denmark has put forward the idea that there is a new notion of "ships with special characteristics" which has been introduced in Part II of the Convention of 1982, and which could include also MODUS. Passage of this category of ships could, it is said, be subject to treatment different from that accorded to other ships.

One may note, in passing, that this position of one of Denmark's main counsel concedes two points Denmark has been otherwise very reluctant to accept - namely that MODUS are ships, and that the 1982 Convention can be invoked in discussing passage through the Great Belt.

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[1] Danish Written Observations of 28 June 1991, para. 105; pleading by the counsel of Denmark, Dr. Jiménez de Aréchaga, 2 July 1991.

[2] Pleading by the counsel of Denmark, Dr. Jiménez de Aréchaga, 2 July 1991.

[3] Pleading by the counsel of Denmark, Dr. Jiménez de Aréchaga, 2 July 1991.

417. Coming back to the question of "ships with special characteristics", it is true that this expression is used in Part II of the Convention of 1982. It appears in Article 22, paragraph 3-c, where it is stated that "In the designation of sea lanes and the prescription of traffic separation schemes under this article, the coastal State shall take into account:

c) the special characteristics of particular ships and channels".

It emerges clearly from this provision that the Convention does not intend to create a category of "ships with special characteristics". If one reads the Article in its entirety, it appears immediately that it concerns only sea lanes and traffic separation schemes that the coastal State may designate or prescribe for the use of foreign ships "where necessary having regard to the safety of navigation" (paragraph 1 of the same Article), and whose use it may require for tankers, nuclear powered ships and ships carrying nuclear or other intrinsically dangerous or noxious substances (paragraph 2).

Consequently, all that can be inferred from the 1982 Convention is that the coastal State may designate sea lanes and prescribe traffic separation schemes for the passage of MODUS, if this is necessary for the safety of navigation. What cannot be inferred is that laws or regulations may make their right of passage dependent upon their height or the adaptation of their construction to the presence of a bridge.

Section XI. The right of passage and the height of a bridge over the strait

418. The right of the State bordering the strait to adopt laws and regulations concerning the question of safety of navigation consequential to the existence of a bridge is similar to the right of adopting laws and regulations consequential to the fact that the strait has a certain depth or a certain width. It is a right consequential to a factual situation. But a legal right cannot arise from facts which the State invoking the right has itself brought about in violation of international law.

The right to prescribe that ships may pass through the strait only if they do not exceed a certain height because of the existence of a bridge of a certain height is similar to the right to prescribe that ships may pass only if they do not exceed a certain width or a certain draught because of the width or depth of the strait. Such right cannot, however, justify the construction of a bridge, any more than the other rights mentioned above can justify works that make the strait narrower or shallower. It is one thing to adopt laws and regulations consequential to a factual situation; it is quite another to change such a factual situation.

419. It is a factual necessity, once a bridge has been built, that navigation and shipbuilding take into account its existence, even when the building of the bridge is not in conformity with international law. In the latter case a problem of international responsibility obviously arises. This is implicit in the Court's Order of 29 July 1991 on the request for provisional measures in the present case, where it is stated that

> "if it is established that the construction of works involves an infringement of a legal right, the possibility cannot and should not be excluded *a priori* of a judicial finding that such works must not be continued or must be modified or dismantled".[1]

A different view was held, apparently, by the Danish scholar, and former Legal Adviser to the Danish Foreign Ministry, Max Sørensen who seems to transform what is a factual necessity into a legal principle of priority. According to Sørensen:

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[1] *ICJ Reports 1991*, p. 19 (para. 31).

> "Once the bridge is in place future shipbuilding must take it into account. One can invoke from this point of view a precise principle of priority'"[1].

Even starting from Sørensen's point of view, this has, however, nothing to do with the question of whether the bridge can legally be built in the face of the obligation to allow passage through the strait.

420. While there can be no doubt that territorial sovereignty over the land whose coasts border the strait and over the waters of the strait includes the right to build a fixed link between the coasts separated by the strait, there can be no doubt either that such a right cannot be exercised in such a way as to deprive the strait - in whole or in part - of its character as a navigable waterway. This is particularly true in the light of the positive obligation to permit passage which exists for Denmark as regards the Great Belt. The Danish specialist on the law of straits, Erik Brüel, in considering the Copenhagen Treaty of 1857, expressed these concepts as follows: "...even if the treaty does not place upon Denmark any duty to maintain the Straits as navigable waterways the fact that it does pre-suppose them to be such raises the presumption, that Denmark cannot *actively deprive them* of their character as such e.g. by building enbankments or bridges without openings wide enough for navigation, over all three waterways".[2]

Even in an intervention that Denmark quoted in support of its position in the *Written Observations* concerning the Request for provisional measures in the present case[3], the Danish representative, Ambassador Fergo, did not go beyond making the uncontested point that the construction of bridges and tunnels across the Danish straits was vital for Denmark within the limits of "the obligation not to hamper the free passage of ships in transit".[4]

421. The navigation which must be preserved is that of all ships. Brüel, having said that

> "Bridges and enbankments must be so constructed that practically all ships can pass under, respectively through them without such difficulties in manoeuvering that the strait ceases to be a navigable waterway"[5] affirms that, if the view were accepted that Denmark can "by way of a bridge or enbankment or in some other way close one or even two of them (i.e. the Danish straits), as long as one is left open",
> "the strait that is left open must at all events be passable by *all ships* i.e. only the Great Belt could be considered as fulfilling this condition since the construction of the Little Belt bridge".[6]

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[1] Unofficial translation from the German original: "Brückenbau und Durchfahrten in Meerengen", in *Recht im Dienst des Friedens. Festschrift für Eberhard Menzel*. Berlin, 1975, p. 551 et seq., at p. 557.

[2] Erik Brüel, *International Straits*, (1947), vol. II, p. 43, italics in the original. In the lectures made in French in 1936 "Les détroits danois au point de vue du droit international", *Recueil des Cours* (1936 I), p. 595 et seq., at p. 623, Brüel uses the expression "intervention positive" which seems to convey even more clearly than the English expression "actively deprive" the idea of a modification of the natural situation of the strait.

[3] Para. 122.

[4] Annex No 75.

[5] Erik Brüel, *International Straits*, (1947), vol. II., p. 43, italics supplied.

[6] *Ibid.*, p. 44, italics in the original.

Sørensen makes the point that the bridge must be so constructed that "it does not create any obstacle for the navigation through the strait even of the biggest ships existing at the time".[1] He also observes that

> "it is not possible, and therefore also not necessary, to take into account unknown future developments". [2]

422. These authoritative positions converge in holding that the height of a bridge to be constructed depends on the height of the tallest ships known to exist - without excluding, as is clear from the last quotation of Sørensen, *known* future developments. The importance of future trends in shipbuilding was underlined by Poland in its Note of 6 December 1977[3] in which it responded to the Danish Note of 12 May 1977[4]. In responding to the Polish note, Denmark, by indicating that it had made a study of the "tendences actuellement prévisibles dans les techniques de constructions maritimes", concedes that such trends are relevant as regards the construction of a bridge[5].

423. The existence of MODUS exceeding in height the maximum clearance of the planned bridge was well known in the 1970s when Denmark passed its first, and unsuccessful, law on the construction of the bridge. The passage of such ships through the Great Belt was a normal occurrence in the 1980s, when the second law was adopted and the decision to build a bridge and not a tunnel for road traffic across the East channel was taken.

Consequently the planned bridge, if constructed in such a way as to make the passage of MODUS impossible, would not be compatible with the limits to the exercise of the right of building a fixed link indicated above. As will be demonstrated below, MODUS are ships; and they are existing ships, not unknown future developments.

424. It may be argued - and it has been argued by Denmark in its Written observations and pleadings before this Court on the Finnish request for provisional measures in the present case - that other bridges have been constructed over straits and that these bridges have a clearance equal or similar to that of the planned Great Belt bridge. This would give rise to a kind of "international standard", to which the planned Great Belt bridge would be conforming.

First of all, any such supposed international standard would certainly not be constant in time. So, for instance, in discussing in 1936 the Little Belt bridge and the ideas then under consideration for a bridge over the Great Belt, Erik Brüel expressed strong doubts on the compatibility with international law of the construction of the bridge over the Little Belt because, by giving it a clearance of 33 metres, Denmark "a non seulement rendu plus difficile le passage par ce détroit, mais aussi - sans d'autres motifs que des simples raisons d'économie - *completement privé* une partie des navires de la possibilité même de l'utiliser"[6] Brüel than states that a clearance of 42 metres would have been preferable because it would have permitted passage of almost all ships and adds that the fact that the plans then current for a bridge on the Great Belt envisaged a clearance of 42 metres made the proposed bridge compatible with the Copenhagen Treaty as well as with general rules of the law of nations concerning international straits.

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[1] Unofficial translation from the German original, Brückenbau und Durchfahrt in Meerengen, quoted above, para 419, footnote 1, p. 556.

[2] *Ibid.*, p. 557, unofficial transl.

[3] Annex 24.

[4] Annex 22.

[5] Note Verbal of 3 July 1978, Annex No. 6 to the Danish Written Observations on the request for provisional measures in the present case.

[6] Erik Brüel, "Les détroits danois au point de vue du droit international", 55 *Recueil des Cours* (1936 I) p. 595 et seq., at p. 672.

Forty-two metres is certainly different from sixty-five. If there is an international standard it is certainly one that changes with the passing of time.

425. Moreover, doubts may be raised as to the existence of any such international standard. All the examples given concern bridges in internal waters (Cf. Part II, Chapter VII above). And all - with the exception of the Bosphorus bridges - have alternative passages. This is particularly true of the bridges built in Japan, which are, moreover, all included within the Japanese baselines and consequently in Japanese internal waters. Together with the Bosphorus bridges, the Great Belt bridge would be the only bridge over an international strait not permitting an alternative route (the routes through the Little Belt and through the Sound not being real alternatives because of the presence of a bridge over the first and of the shallowness of the second). Can an "international standard" be built upon such limited practice?

426. Leaving aside the fact, which is not, however, without relevance, that while the Great Belt includes Danish territorial sea, the Bosphorus lies entirely within internal waters of Turkey, the main difference between the Great Belt and the Bosphorus is that the Great Belt is a route for the passage of tall MODUs and of tall cruiseships, while the Bosphorus is not.

For each strait the notion of existing and reasonably foreseeable ships may be different. The decisive element is which ships do in fact pass through a specific strait or are likely to pass in the light of known trends of maritime traffic and shipbuilding. An interesting indication pointing in this direction can be found in a recent Report by the International Maritime Organization's Sub-Committee on Safety of Navigation as regards the proposed bridge over the Strait of Messina . This strait, it may be noted, permits an alternative route on the high seas. Moreover, the decision to build a suspended bridge is still under discussion, as the alternative of an underwater bridge at a depth of 30 metres is actively considered[1].

The Report states that the minimum clearances proposed in the two alternative proposals for a suspended bridge, namely 55 metres for a two-span bridge and 64 metres for a single span bridge, "should be more than adequate for *ships likely to use the Strait of Messina, so far as can be foreseen*". [2]

This is a clear indication that, in assessing the clearance for a bridge over an international strait, the specific traffic using that particular strait should be considered; and this not only as far as the present is concerned but also as regards the foreseeable future.

Section XII. Concluding Remarks

427. In the light of the observations made, the following main conclusions may be drawn as regards the law applicable to passage through the Great Belt.

The right of passage through the Great Belt, whose existence Finland asks the Court to declare, is based on a set of rules which constitutes a regime with treaty-law and customary-law components.

This regime has been formed on the basis of the Copenhagen Treaty of 1857, and has developed in the light of the notion of innocent passage as codified in the Geneva

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[1] Report in I.M.O. document NAV 35/14 No. 3.7.4., as well as *Ecos, ENI's Monthly Magazine*, excerpts from No. 212/213, p. 65 et seq.

[2] I.M.O. document NAV 35/14 of 2 February 1989, italics supplied.

Convention of 1958 and as shaped by customary law, most recently under the influence of the 1982 United Nations Convention on the Law of the Sea, as well as of the emergence of special rules on passage applicable to straits.

This regime - and also the practice of Denmark - provides for free passage through the Great Belt of ships not included in the category of warships, without distinction based on the nationality or on the characteristics of the ships.

Each of the rules that merge into the specific passage regime of the Great Belt is, however, sufficient to uphold the right claimed by Finland. This is true, in particular, as far as "innocent passage" is concerned.

The State bordering the strait is entitled to adopt laws and regulations concerning safety of navigation; but this does not include the right to interfere actively in the factual situation of the strait so that it loses in whole or in part its character as an international waterway.

The height of a bridge which can be built over a strait does not depend on international standards but on the characteristics of the ships which in fact use that particular strait or may reasonably be foreseen to use it.

MODUS directed to and coming from Finnish ports and shipyards and exceeding the height of the planned bridge have been passing through the Great Belt for about two decades and can be foreseen to pass through it in the future; moreover, cruise and other ships exceeding that height may be foreseen to pass in the future. Consequently, there exists a right of passage through the Great Belt which Denmark is bound not to violate with the construction of the bridge as planned.

CHAPTER II

THE SHIPS ENTITLED TO PASSAGE

Section I. Introduction

428. The history of shipbuilding is one of continual innovation. There are innovations in the use of materials, such as iron-clad, iron hulled and plastic hulled vessels. There are innovations in design, such as the development of aircraft carriers, submarines, Very Large Crude Carriers (or "supertankers"), and hydrofoils. While there is an overall tendency for the size of merchant vessels to increase, it is difficult to predict the precise nature of future developments for a period as long ahead as the bridge across the Belt is intended to last.

429. Even the dimensions of existing port facilities impose no long-term constraint on the size of ships. As one recent study observed:

> "In order to cater for the increasing size and variety of vessels, and to provide additional land close to deep-water berths, many traditional ports have extended downstream from their historic locations at the heads of estuaries. The most successful ports have been almost completely rebuilt..."[1]

430. Port construction and ship design influence each other. Bigger ships create a demand for larger port facilities; and new, large port facilities encourage the building of ships as big as the economics of the shipping trade dictate. Neither developments in ship design nor developments in port construction can be predicted with much accuracy over the long term.

Section II. Types of Ship

431. In the context of the present case and of the international regulation of navigation it is helpful to classify the different types of ship according to the relevant characteristics of their construction. There is as much variety among ships as there is among States. Warships and small pleasure craft are not of concern in the context of these proceedings. But ships of five other identifiable types are. These types are vessels of conventional design, drill ships, semisubmersibles, Very Large Crude Carriers (VLCCs), and jack-up drill barges.

432. The characteristics of these vessels are described in more detail in Part II of this Memorial (paragraphs 163-181, 210-275). Here it is necessary only to draw attention to their more salient characteristics.

433. Merchant ships of conventional design are, by definition, the archetypes of merchant shipping. Constructed with a hull of conventional shape, powered wholly or largely by mechanical means, navigable, and bearing their cargoes in the hold or on the deck or in the superstructure, they represent the traditional conception of a ship. At the lower end of the scale they merge with the category of pleasure craft, and include tugs and small barges. At

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[1] R.B. Clark, *The Waters Around the British Isles: Their Conflicting Uses* (1987), pp. 162-163. Note also the development of offshore loading facilities in the USA, regulated under the Deepwater Port Act of 1974: A.W. Rovine, *Digest of United States Practice in International Law 1974* (1975), pp. 356-360.

the upper end they include vessels such as the 67,000 GRT, 293 metre-long *Queen Elizabeth 2*.

434. Drill ships are ships built with hulls of conventional shape modified to accept a drill rig installed on the deck. Their height is typically around 80 metres, and their draught around 7 metres. They are self-propelled. They have no other special characteristics marking them out from ships of conventional design, and they can be assimilated to those ships. Ships carrying cranes may also be included in this category.

435. Semi-submersibles are navigable platforms bearing drill rigs or other equipment. Some have been converted or specifically built for use as production platforms or accommodation units for offshore workers. When bearing drill rigs, their overall height can reach around 80 metres. They are commonly powered by independent engines attached to their legs and known as thrusters. The thrusters can propel the semi-submersible at speeds approximately equivalent to the speed at which they could be towed, this being around 10 knots. The thrusters may also be used to maintain the semisubmersible in the precise location intended when it is operating on site. The hulls of semi-submersibles are of variable design. In some the operating platform is supported on two or more pontoons shaped like conventional ship hulls. Others are supported by stability columns which control flotation of the semi-submersible by ballasting: these have a shape closer in appearance to fixed offshore platforms. Semisubmersibles are designed so as to be easily navigable, and to operate afloat, rather than resting on the sea-bed as is the case with submersible drill rigs.

436. The term VLCC does not strictly designate a distinct class of ship, but rather applies to the larger bulk oil carriers. The largest crude carriers are known as ULCCs -Ultra Large Crude Carriers. Because of their size, such vessels have considerable difficulty in stopping and manoeuvreing. They are accordingly treated differently from other vessels for certain purposes, notably under the 1972 Collision Regulations, in which a VLCC or ULCC falls under the heading of "vessel restricted in her ability to manoeuvre." Ultra Large Crude Carriers may have draughts of around 10 metres and air draughts of the order of 55 metres to 70 metres.

437. Jack-up drill barges are seaworthy barges having three or more "legs" which can be jacked down to the sea-bed. The legs give the barge an air draught of around 100 metres to 140 metres. Once the legs are resting firmly on the sea-bed the barge is jacked up on the legs until it is clear of the water. Although some may be fitted out so as to be capable of navigation under their own power, most are towed to and from the sites on which they operate. (For present purposes, references to jack-ups are to those not self-propelled: selfpropelled jack-ups may be assimilated to semisubmersibles). Tows are of two types. The first is the traditional wet tow, using one or, in narrow or difficult passages, two tugs. The other is the dry tow, in which the jack-up is carried on a barge which is itself towed, or on a heavy lift barge, the deck of which can be lowered below sea level by ballasting in order to permit the jack-up to be manoeuvred into a position directly above the deck, which is then raised. The jack-up is then secured to and transported on the deck. In general, modern jack-ups are designed to move across oceans with their full leg length intact.

438. It should be noted that both semisubmersible rigs and jack-up barges are quite distinct from the traditional fixed offshore production platforms, which are in essence towers build on the sea-bed. In the case of these fixed platforms the main part of the central supporting tower which bears the production platform is built on shore and carried by heavy-lift barge to the production site, where it is lowered into the water and secured firmly to the sea bed. The platform is designed as a "permanent" attachment to the sea-bed, and is not designed to be mobile. Semisubmersibles and jack-up barges, on the other hand, are

designed precisely in order that they should be capable of navigating easily and frequently from site to site. For example, in the North Sea alone there are around 300 location moves each year. This reflects the differing economics of offshore oil production, for which a permanent platform may be appropriate, and offshore oil exploration, for which fixed installations are not appropriate.

439. Drill ships, semisubmersible drill rigs, and jack-up drill barges are referred to collectively as MODUs (Mobile Offshore Drilling Units). However, it must be emphasized that semisubmersible platforms are not used only to carry drill rigs. They may carry accommodation units for offshore workers, offshore production facilities, or other equipment. (See also Annex 31, Offshore Data Report). Platforms may be and are converted from one such use to another. Accordingly, it would be more accurate to use the term MOUs (Mobile Offshore Units) to refer to drill ships, semisubmersibles (whether carrying drill rigs or other loads) and jack-up drill barges collectively. However, in deference to current fashion, the term MODU is used here, with the understanding that it includes mobile offshore units carrying equipment other than drill rigs.

440. Not all of the distinctions between different kinds of ship are material in the context of the present case. Drill ships and crane ships have, while navigating, no characteristics which necessitate their separation in the context of consideration of rights of navigation and passage from the class of ships of conventional design.

441. Semisubmersibles are designed to be able to navigate independently and under their own power. As will be shown, they are in fact treated for the purposes of navigation in the same manner as any other ship. However, because they do not possess the same degree of manoeuvrability as small ships of conventional design they are properly grouped with VLCCs as ships having a restricted ability to manoeuvre.

442. Jack ups are not usually independently powered, but navigate by being towed. It is therefore appropriate to give them special consideration, as is done below.

443. In drafting the wide variety of regulations applicable to shipping it is appropriate to draw distinctions in order to accommodate the particular characteristics of the vessels in question. Thus, in the same way that pollution instruments commonly distinguish between tankers and other ships, and the Montreux Convention of 1936 distinguishes between capital ships and other warships, it may be desirable to distinguish between different types of ship for the purposes of regulating navigation. This, indeed, is precisely the rationale of the special category of "vessels restricted in their ability to manoeuvre" in the Collisions Regulations made under the 1972 Convention on the International Regulations for Preventing Collisions at Sea. The appropriateness of special consideration for different types of ship does not, however, imply that some vessels cease to be ships.

Section III. The Concept of a Ship in International Law

444. The concept of a ship in international law is a wide one, and no single definition is accepted as authoritative.[1] The following paragraphs discuss the scope of that concept in international treaty practice, municipal law, doctrine, and the actual practice of States.

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[1] See D.P. O'Connell, *The International Law of the Sea*, vol. II (ed I.A. Shearer) (1984), pp. 747-750.

A. TREATY PRACTICE

445. There is no single definition of the word "ship" accepted in international treaty practice. Many treaties concluded in the first half of this century simply used the term "vessel"[1] or "ship"[2], without providing any definition of the term; and some instruments used both terms, drawing no distinction between them.[3] The words "ship" and "vessel" usually correspond to a single word in French, *navire*[4], and in Spanish, *buque*[5].

Some of the treaties concluded during this period did attempt definitions of the terms "ship" or "vessel".[6] These definitions tended to be simple, and to emphasise the breadth of the concept. The Convention for the Unification of Certain Rules relating to Bills of Lading for the Carriage of Goods by Sea, 1924, for example, stipulated that:

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[1] See, for example, the treaties listed in Annex 80.

[2] See, for example, the treaties listed in Annex 80.

[3] See, e.g., the Convention (Preamble) and Statute on the International Regime of Maritime Ports, Geneva, 9 December 1923, 58 LNTS 285; Convention for the Unification of Certain Rules relating to the Limitation of Liability of Owners of Seagoing Vessels, Brussels, 25 August 1924, 120 LNTS 123; PanAmerican Sanitary Convention, Habana, 14 November 1924, 86 LNTS 43; Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels, Brussels, 10 April 1926, 176 LNTS 199; Sanitary Convention, Paris, 21 June 1926, 78 LNTS 229; Convention on Maritime Neutrality, Habana, 20 January 1928, 135 LNTS 187; Convention on Safety of Life at Sea, London, 31 May 1929, and Annex (Regulations completing the Provisions of the Convention on Safety of Life at Sea) and Annex II (Regulations for Preventing Collisions at Sea), 136 LNTS 81; Convention concerning the Regime of the Straits, Montreaux, 20 July 1936, 173 LNTS 213; Procès-Verbal concerning Rules of Submarine Warfare, London, 6 November 1936, 173 LNTS 35.

[4] See, for example, the Convention for the Unification of Certain Rules relating to the Limitation of Liability of Owners of Seagoing Vessels, Brussels, 25 August 1924, 120 LNTS 123; Convention on Maritime Neutrality, Habana, 20 January 1928, 135 LNTS 187; Convention concerning the Regime of the Straits, Montreaux, 20 July 1936, 173 LNTS 213.

Where inland navigation vessels were concerned, the word "bateau" often corresponded to the word "vessel": see, for example, the Convention for the Unification of Certain Rules concerning Collisions in Inland Navigation, Geneva, 9 December 1930, [Hudson, *International Legislation*, vol. V, 815], and the Convention on the Registration of Inland Navigation Vessels, Rights *in rem* over such Vessels, and other Cognate Questions, Geneva, 9 December 1930 [Hudson, *International Legislation*, vol. V, 822]. Where warships are signified, the word "vessel" is sometimes translated as "bâtiment": see, for example, the Treaty for the Limitation of Naval Armament, London, 25 March 1936, 184 LNTS 115; Convention concerning the Regime of the Straits, Montreaux, 20 July 1936, 173 LNTS 213.

There is no consistent practice determining the relationship between the terms. For instance, the *Protocole de clôture* of the Modus Vivendi concerning the Revised Convention for the Navigation of the Rhine, Strasbourg, 4 May 1936, stipulated that "le terme 'bâtiment' s'applique aux navires et bateaux, y compris les engins flottants et les hydroglisseurs, ainsi qu'aux radeaux" [Hudson, *International Legislation*, vol. VII, 290] . On the other hand, the ILO Revised Convention Fixing the Minimum Age for the Admission of Children to Employment at Sea, Geneva, 24 October 1936, 40 UNTS 205, stipulated in article 1 that " Pour l'application de la presente convention, le terme 'navire' doit être entendu de tous les bateaux, navires ou bâtiments, quels qu'ils soient, de proprieté publique ou privée, effectuant une navigation maritime..."

[5] See, for example, the Pan-American Sanitary Convention, Habana, 14 November 1924, 86 LNTS 43; Treaty on International Commercial Navigation Law, Montevideo, 19 March 1940, Hudson, *International Legislation*, vol . VIII, 460 . Spanish practice is less consistent than French. For instance, the Convention on the Repression of Smuggling, Buenos Aires, 19 June 1935, uses the terms "embarcaciones" (art. 6), "barcos" (art. 6), "vapor" (art. 10), and "buque" (art. 13), in each case translated as "vessels" or "vessel" in the English text: Hudson, *International Legislation*, vol. VII, 100.

[6] Examples of treaty provisions defining the term "ship" are set out in Annex 80.

"'Ship' means any vessel used for the carriage of goods by sea."[1]

446. A more detailed, but equally broad, definition was adopted in the first treaties concluded under the auspices of the International Labour Organization:

> "For the purpose of this Convention, the term "vessel" includes all ships and boats, of any nature whatsoever, engaged in maritime navigation, whether publicly or privately owned."[2]

447. In certain Conventions concerned with the welfare of seamen this was subsequently revised to read as follows:

> "For the purpose of this Convention the following expressions have the meanings hereby assigned to them, viz:
>
> (a) the term "vessel" includes any ship or boat of any nature whatsoever, whether publicly or privately owned, ordinarily engaged in maritime navigation;"[3]

The narrowing of the meaning of "vessels" by inclusion of the reference to vessels "ordinarily engaged in navigation" is explicable by the purpose of the Conventions. These Conventions were concerned with seamen, rather than with vessels as such; and the effect of the modification was to confine the ambit of the treaty to persons who were ordinarily employed as seamen rather than as offshore workers in general.

448. In multilateral treaties of the inter-war period specifically concerned with navigation, on the other hand, there is no evidence of any trend towards narrowing of the meaning of "ship" or "vessel". For instance, the 1930 Convention for the Unification of Certain Rules concerning Collisions in Inland Navigation stipulated that:

> "For the purposes of this Convention, the term 'vessels' includes hydroplanes, rafts, ferryboats, dredgers, floating cranes and elevators, movable sections of boat-bridges and all floating appliances or plant of a similar nature."[4]

Though limited in its examples by the vessels in operation at the time that the Convention was drafted, this definition illustrates clearly the tendency to define vessels in a functional manner, including all kind of craft in fact engaged in or capable of navigation.

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[1] Brussels, 25 August 1924, art. l(d), 120 LNTS 155.

[2] ILO Convention Fixing the Minimum Age for Admission of Children to Employment at Sea, Genoa, 9 July 1920, Article 1, 38 UNTS 109. See also ILO Convention concerning Unemployment Indemnity in case of Loss or Foundering of the Ship, Genoa, 9 July 1920, 38 UNTS 119; ILO Convention Fixing the Minimum Age for the Admission of Young Persons to Employment as Trimmers or Stokers, Geneva, 11 November 1921, 38 UNTS 203; ILO Convention concerning the Compulsory Medical Examination of Children and Young Persons Employed at Sea, Geneva, 11 November 1921, 38 UNTS 217; ILO Revised Convention Fixing the Minimum Age for the Admission of Children to Employment at Sea, Geneva, 24 October 1936, 40 UNTS 205.

[3] ILO Convention Concerning Seamen's Articles of Association, Geneva, 24 June 1926, article 2, 38 UNTS 295. See also ILO Convention concerning the Repatriation of Seamen, Geneva, 23 June 1926, 38 UNTS 315.

[4] Geneva, 9 December 1930, art. 11, Hudson, *International Legislation*, vol. V, 815. Cf., the Convention on the Registration of Inland Navigation Vessels, Rights *in rem* over such Vessels, and other Cognate Questions, Geneva, 9 December 1930, article 6 of which provided that:

"Each Contracting State may, under conditions referred to in Articles 3 and 4, require or permit the following to be entered in its registers: (1) Floating cranes and elevators, and all similar appliances; (2) Pleasure craft; (3) Vessels, including dredgers, of less than 20 metric tons." [Hudson, *International Legislation*, vol. V, 822.]

449. A similar approach was adopted in the 1938 Police Regulations concerning Navigation on the Rhine. Those Regulations were adopted in the context of article 1 of the Treaty of Mannheim, which stipulated that

> "La navigation du Rhin et de ses embouchures, depuis Bâle jusqu'à la plein mer, soit en descendant, soit en remontant, sera libre aux navires de toutes les nations pour le transport des marchandises et des personnes, à la condition de se conformer aux stipulations contenues dans la présente Convention et aux mesures prescrites pour le maintien de la securité générale."[1]

Article 1 of the 1938 Regulations read as follows:

" Dans le présent règlement:

> a) Le terme 'bâtiment' s'applique aux navires et bateaux, y compris les engins flottants, les hydroglisseurs, les menues embarcations et les bacs; b) Le terme 'engin flottant' désigne les constructions flottantes sur lesquelles sont installés des appareils mécaniques tels qu'appareils de dragage, grues, élévateurs, sonnettes (et les bacs) il ne s'applique pas aux radeaux."[2]

450. It may be noted that the draft Articles on the Territorial Sea prepared by the Second Committee of the Hague Codification Conference of 1930 ascribed a right of innocent passage not only to vessels traversing the territorial sea without entering inland waters but also to vessels proceeding to inland waters or making for the high seas from inland waters.[3] The broad definition of ships adopted in instruments concerned with inland navigation are, therefore, directly relevant to the question of the category of craft enjoying the right of innocent passage.

451. Both marine and aerial navigation were conceived in functional terms. The functional approach evident in the meaning ascribed to the term "vessels" was mirrored in the definition of the term "aircraft" in the Pan-American Sanitary Convention, article 2 of which read as follows: "*Definitions* "*Aircraft*. -Any vehicle which is capable of transporting

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[1] Convention respecting Navigation of the Rhine, Mannheim, 17 October 1868, article 1, Parry, *Consolidated Treaty Series*, vol. 138, p. 168. See also the Treaty of Mayence, 31 March 1831, article 1, Parry, *Consolidated Treaty Series*, vol. 81, p. 307.

[2] Police Regulations concerning Navigation on the Rhine, Paris, 25 August 1938, Hudson, *International Legislation*, vol. VIII, 103. The Regulations continue as follows:

> "c) Le terme 'radeau' désigne tout assemblage de pièces de bois destiné à être transporté par flottage, qu'il soit ou non remorqué;
>
> d) Le terme 'établissement flottant" designe toute installation flottante autre que les bâtiments et les radeaux, telle que bains, docks, appontements, hangars pour bateaux;
>
> e) Le terme 'bâtiment muni de moyens mécaniques de propulsion' s'etend aux bâtiments utilisant pour leur propulsion un moteur auxiliaire, même lorsque ce moteur est placé sur une installation flottante annexe (chaloupe de propulsion ou de traction), que la chaloupe de propulsion ou de traction exige ou non un personnel de service permanent; ce terme ne s'etend pas aux bâtiments remorqués..."

[3] Article 3: 24 *AJIL Supp.* 239 (1930). The definitions of the right of innocent passage in the 1958 Convention on the Territorial Sea and Contiguous Zone (article 14(2)), and the 1982 UN Convention on the Law of the Sea (article 18(1)), are couched in similar terms.

persons or things through the air, including aeroplanes, seaplanes, gliders, helicopters, air ships, balloons and captive balloons."[1]

452. After 1945 treaty-making in matters affecting shipping became an increasingly specialised matter, particularly after the entry into force in 1958 of the treaty establishing the Inter-Governmental Maritime Consultative Organization, subsequently re-named the International Maritime Organization. Although some treaties continued the practice of using the term "ship" or "vessel" without defining it[2], in others the increasing specialization in treaty-making is reflected in the refinement of the definition of meaning of the terms "ship" and "vessel", although without any reduction in the breadth of that meaning.

453. The increasing refinement of the concept of a ship or vessel is evident in the context of treaties on marine pollution. The 1954 International Convention for the Prevention of Pollution of the Sea by Oil[3] did not define the word "ship", which it used to denominate the craft to which obligations under the Convention applied. A definition was, however, adopted in the 1962 Amendments to the 1954 Convention. Article 1 (1) of those Amendments included the stipulation that:

> "Article 1
>
> For the purposes of the present Convention, the following expressions shall (unless the context otherwise requires) have the meanings hereby respectively assigned to them, that is to say
>
> . . .
>
> "Ship" means any sea-going vessel of any type whatsoever, including floating craft, whether self-propelled or towed by another vessel, making a sea voyage; and " tanker " means a ship in which the greater part of the cargo space is constructed or adapted for the carriage of liquid cargoes in bulk and which is not, for the time being, carrying a cargo other than oil in that part of its cargo space.[4]"

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[1] Habana, 14 November 1924, 86 LNTS 43. Cf., the Sanitary Convention for Aerial Navigation, The Hague, 12 April 1933, 161 LNTS 65, article 1(1) of which states: "The word *aircraft* includes any machine which can derive support in the atmosphere from the reactions of the air and is intended for aerial navigation."

[2] See, for example, the Convention on the Inter-Governmental Maritime Consultative Organization, Geneva, 6 March 1948, 289 UNTS 48; Convention on the Territorial Sea and Contiguous Zone, Geneva, 29 April 1958, 516 UNTS 205; Convention on the High Seas, Geneva, 29 April 1958, 450 UNTS 82; Convention on the Continental Shelf, Geneva, 29 April 1958, 499 UNTS 311; Convention on the Facilitation of International Maritime Traffic, London, 9 April 1965, 591 UNTS 265; the International Convention for the Safety of Life at Sea, London, 1 November 1974, 1184 UNTS 2; Convention on Limitation of Liability for Maritime Claims, London, 19 November 1976, 16 *International Legal Materials* 606 (1977); United Nations Convention on the Carriage of Goods by Sea, Hamburg, 31 March 1978, 17 *International Legal Materials* 608 (1978); the International Convention on Standards of Training of Certification and Watchkeeping for Seafarers, London, 7 July 1978, UKTS 50 (1984); Belgium-Denmark-Finland-Federal Republic of Germany-Greece-Ireland-Italy-Netherlands-Norway-Portugal-Spain-Sweden-United Kingdom, Memorandum of Understanding on Port State Control in Implementing Agreements on Maritime Safety and Protection of the Marine Environment, Paris, 26 January 1982, 21 *International Legal Materials* (1982) .

[3] London, 12 May 1954, 327 UNTS 3.

[4] 1962 Amendments to the International Convention for the Prevention of Pollution of the Sea by Oil, 1954, 600 UNTS 332 . The same definition was adopted in the 1969 Amendments to the 1954 Convention: UKTS 21 (1978) . See also the Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matter, London, 29 December 1972, article III, 1046 UNTS 120.

454. This definition illustrates three points. First, the definition of a ship, even in a treaty with so specific a purpose as the prevention of oil pollution, is remarkably broad. It rests the definition on the fact of the vessel making a sea voyage, rather than on any characteristics of construction or purpose which might narrow the category of ships to which the Convention relates. Second, it explicitly includes within the definition non-self-propelled craft making a sea voyage under tow by another vessel. This is of particular relevance to jack-up barges, which are commonly transported in this manner. And third, the ancillary definition of the word "tanker" demonstrates the manner in which specific characteristics of construction or purpose (or, as here, both) are taken into account in order to narrow the definition of a vessel in circumstances where that is considered necessary. That narrowing does not apply at the level of the conception of a ship or vessel: it applies by the creation of a sub-category of the category of ship.[1]

455. The definition in the 1954 Oil Pollution Convention might be thought to leave open the question whether the term "ship" should be read subject to an implied condition limiting the term to vessels with an appearance similar to ships of traditional design, so as to exclude, for example, platforms. That question was clearly answered in subsequent treaties.

456. One of the first clear articulations of the breadth of the concept of a ship was included in the 1972 Oslo Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft, article 19 of which stated that: "For the purpose of this Convention:

> . . .
>
> 2) "Ships and aircraft" means sea-going vessels and air-borne craft of any type whatsoever. This expression includes air-cushion craft, floating craft whether self-propelled or not, and fixed or floating platforms."[2]

457. Attempts to reverse the tendency towards explicit use of such broad definitions of the term "ship" were unsuccessful. The successor to the 1954 Oil Pollution Convention, the 1973 "MARPOL" Convention, contained the following stipulation: "Article 2 Definitions For the purposes of the present Convention, unless expressly provided otherwise:

> . . .
>
> (4) "Ship" means a vessel of any type whatsoever operating in the marine environment and includes hydrofoil boats, air-cushion vehicles, submersibles, floating craft and fixed or floating platforms."[3]

On at least five occasions in the Conference which adopted the 1973 MARPOL Convention proposals to delete from the definition of ships the reference to fixed and floating platforms were defeated. It is difficult to see how it could be made plainer that all kinds of vessel, including drill ships and drill platforms, are included within this definition, which is widely echoed in other pollution treaties.[1] Platforms are ships for the purposes of these treaties.

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[1] But see the definitions in the International Convention on Civil Liability for Oil Pollution Damage, Brussels, 29 November 1969, 973 UNTS 3, article 1 of which provided that "'Ship' means any sea-going vessel and any seaborne craft of any type whatsoever, actually carrying oil in bulk as cargo"; and cf., the Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution, 14 January 1971, 10 *International Legal Materials* 137 (1971)

Similarly, article 2 of the IMO Draft Protocol to the International Convention on Civil Liability for Oil Pollution Damage 1969, London, 1984, 23 *International Legal Materials* 177 (1984) provided that article I of the 1969 Liability Convention be amended to provide that "'Ship' means any sea-going vessel and sea-borne craft of any type whatsoever constructed or adapted for the carriage of oil in bulk as cargo, provided that a ship capable of carrying oil and other cargoes shall be regarded as a ship only when it is actually carrying oil in bulk and during [the] [any] voyage following such carriage [unless it is proved that it has no residues of such carriage of oil in bulk aboard] [if it has residues of such carriage of oil in bulk still on board]."

[2] Oslo, 15 February 1972, 11 *International Legal Materials* 262 (1972).

[3] International Convention for the Prevention of Pollution from Ships, London, 2 November 1973, 12 *International Legal Materials* 1319 (1973).

458. This broad definition of ship is not a peculiarity of treaties concerned with the prevention of pollution. A similarly broad definition is adopted in other contexts. For example, the Convention on the International Maritime Satellite Organization provides that:

> "For the purposes of this Convention:
>
> . . .
>
> (f) 'Ship' means a vessel of any type operating in the marine environment. It includes *inter alia* hydrofoil boats, air cushion vehicles, submersibles, floating craft and platforms not permanently moored."[2]

Similarly, the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation states that:

> "For the purposes of this Convention, 'ship' means a vessel of any type whatsoever not permanently attached to the sea-bed, including dynamically supported craft, submersibles, or any other floating craft."[3]
>
> And the International Convention on Salvage states that: "Vessel means any ship or craft, or any structure capable of navigation."[4]

459. One treaty of interest because it addresses in general terms the issue of what counts as a ship is the 1986 UN Convention on the Conditions for Registration of Ships.[5] The Convention was concluded under the auspices of UNCTAD and accordingly reflects that

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[1] See, for instance, the Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft, Oslo, 15 February 1972, 11 *International Legal Materials* 262 (1972), article 19; the Convention on the Protection of the Marine Environment of the Baltic Sea, Helsinki, 22 March 1974, 13 *International Legal Materials* 546 (1974), article 2; the Protocol for the Prevention of Pollution of the Mediterranean Sea by Dumping from Ships and Aircraft, Barcelona, 16 February 1976, 15 *International Legal Materials* 290 (1976), article 3; the Regional Convention for the Conservation of the Red Sea and Gulf of Aden Environment, Jeddah, 14 February 1982, I. Rummel-Bulska and S. Osafo, *Selected Multilateral Treaties in the Field of the Environment*, vol. 2 (1991), 144.

The Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, London, Mexico City, Moscow and Washington, 29 December 1972, 1046 UNTS 120, article III (1)(a), may appear to run counter to this trend in distinguishing between "vessels" and "platforms" in the reference to "vessels, aircraft, platforms or other man made structures". However, article III (2) of that Convention stipulates that "'vessels and aircraft' means waterborne or airborne craft of any type whatsoever. This expression includes air cushioned craft and floating craft, whether self-propelled or not." While there might be platforms which are not vessels, such as fixed man-made platforms build on low-tide elevations, the definition in article III (2), which is similar to that in the 1973 MARPOL, is broad enough to embrace drill ships and drill platforms of the kind in issue in this case.

[2] London, 3 September 1976, 1143 UNTS 105, article 1.

[3] Rome, 10 March 1988, 27 *International Legal Materials* 672 (1988), article 1.

[4] London, 28 April 1989, 14 *United Nations Law of the Sea Bulletin* (December 1989), p. 77, article 1. Cf., the IMO Draft Convention on Liability and Compensation in Connection with the Carriage of Noxious and Hazardous Substances by Sea, London, 1984, 23 International Legal Materials 150 (1984), article 1 of which provides that "'ship' means any sea-going vessel and any seaborne craft of any type whatsoever carrying one or more hazardous substances as cargo."

[5] Geneva, 7 February 1986, 26 *International Legal Materials* 1229.

organization's particular concern with the international shipping trade rather than with the regulation of ships as such, a matter which falls within the competence of the International Maritime Organization. Nonetheless, the Convention adopts a functional approach to the concept of a ship, not limiting the concept of a ship by reference to any particular design characteristics. Article 2 of the Convention stipulates that:

> "'Ship' means any self-propelled sea-going vessel used in the international seaborne trade for the transport of goods, passengers, or both with the exception of vessels of less than 500 gross registered tons."

460. Perhaps the treaty definition most relevant to the present case is that given in the Regulations attached to the 1972 Convention on the International Regulations for Preventing Collisions at Sea.[1] Those Regulations are specifically intended to establish rules for the avoidance of collisions by all navigating vessels: in other words, their intended ambit is co-extensive with the category of navigating vessels. Rule 3 states that:

> "For the purposes of these Rules, except where the context otherwise requires (a) The word "vessel" includes every description of water craft, including non-displacement craft and seaplanes, used or capable of being used as a means of transportation on water. (b) The term "power-driven vessel" means any vessel propelled by machinery.
>
> . . .
>
> (f) The term "vessel not under command" means a vessel which through some exceptional circumstance is unable to manoeuvre as required by these Rules and is therefore unable to keep out of the way of another vessel.
>
> (g) The term "vessel restricted in her ability to manoeuvre" means a vessel which from the nature of her work is restricted in her ability to manoeuvre as required by these Rules and is therefore unable to keep out of the way of another vessel.
>
> The following vessels shall be regarded as vessels restricted in their ability to manoeuvre:
>
> (i) a vessel engaged in laying, servicing or picking up a navigation mark, submarine cable or pipeline;
>
> (ii) a vessel engaged in dredging, surveying or underwater operations;
>
> (iii) a vessel engaged in replenishment or transferring persons, provisions or cargo while underway;
>
> . . .
>
> (vi) a vessel engaged in a towing operation such as severely restricts the towing vessel and her tow in their ability to deviate from their course.
>
> . . ."

While no explicit reference is made to MODUs, they plainly come within the definition, and are treated in practice as doing so.

461. This broad definition of the terms "ship" and "vessel" is continuing in current practice. One of the most recent treaties on maritime matters, the International Convention on Oil Pollution Preparedness, Response and Cooperation[2], uses the following definition:

> "Article 2
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> For the purposes of this Convention:

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[1] London, 20 October 1972, 1050 UNTS 16, 1143 UNTS 346.

[2] London, 30 November 1990, 30 *International Legal Materials* 733 (1991).

> (3) "Ship" means a vessel of any type whatsoever operating in the marine environment and includes hydrofoil boats, air-cushion vehicles, submersibles, and floating craft of any type."

462. As is the case in relation to pre-1945 treaties, there is no evidence of any systematic distinction being drawn between the terms "ship" and "vessel". A Report of the Drafting Committee of the Third UN Conference on the Law of the Sea, having noted the use of both terms in the draft text of the UN Convention on the Law of the Sea, stated:

> "This problem affects only the English and Russian versions since only one word is used in other languages, e.g., *buque* in Spanish and *navire* in
>
> French. The words "ship" and "vessel" are not interpreted as meaning different things in the text.
>
> . . .
>
> In the Arabic, Chinese, French and Spanish texts, one word is used consistently throughout the text. The Drafting Committee suggested that the chairmen of the English and Russian language groups might consult with each other in an attempt to resolve the issue within their groups."[1]

The issue was not, however, resolved. Although towards the end of the conference a suggestion was made that the term "vessel" was broader than the term "ship",[2] no harmonization of the terms was achieved and both "ship" and "vessel" appear in the English text, in the same provisions which had led the Drafting Committee to report that the terms did not mean different things. "Ship" and "vessel" remain interchangeable terms in international law.

463. Multilateral treaty practice throughout this century leads to the conclusion that the legal conception of a ship or vessel has consistently been a broad and functional one, tied to the fact of the craft in question navigating on the sea or with the capacity to do so.

464. Bilateral treaty practice does not diverge from this pattern. Most bilateral treaties use the terms "ship" or "vessel" without defining them.[3] A rare and notable exception is article 1 of the Agreement between the Government of the Kingdom of Denmark and the Government of the German Democratic Republic concerning Salvage Operations in the Internal Waters and Territorial Seas of the Kingdom of Denmark and the German Democratic Republic, which states:

> "For the purposes of this Agreement: 1. 'Ship' means a vessel of any type which is used at sea, including hydrofoil boats, air cushion vehicles, submarines, floating vessels and fixed or floating platforms."[4]

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[1] UN Doc. A/CONF.62/L.40, 22 August 1979; UNCLOS III, O.R., vol. XII, p. 95 at p. 97.

[2] See UNCLOS III, O.R., vol. XVI, p. 13, para. 56 (Mr Yankov).

[3] See, for example, Agreement between the Government of the Kingdom of Denmark and the Government of the Union of Soviet Socialist Republics concerning Shipping, 17 October 1973, 976 UNTS 293; Agreement on Maritime Transport between the Government of the Kingdom of the Netherlands and the Government of the People's Republic of China, 14 August 1976, 1021 UNTS 249; Agreement on Maritime Transport between the Government of the Republic of Finland and the Government of the People's Republic of China, 27 January 1977, 1215 UNTS 65; United States of America - Panama, Panama Canal Treaty, 7 September 1977, 1280 UNTS 3; Agreement on Trade and Shipping between the Czechoslovak Socialist Republic and the Republic of Cuba, 5 November 1977, 1135 UNTS 169; Agreement on Maritime Transport between the Government of Spain and the Government of the Republic of Equatorial Guinea, 5 December 1979, 1177 UNTS 213.

[4] Berlin, 13 October 1976, *UN Legislative Series*, ST/LEG/SER.B/19, p. 408.

465. One qualification needs to be made to this conclusion. As has been seen, several of the definitions are framed in terms wide enough to encompass drill platforms engaged in seabed exploitation and engaged in operations there, as well as platforms navigating the seas. The 1973 MARPOL definition (" "Ship" means a vessel of any type whatsoever operating in the marine environment and includes hydrofoil boats, air-cushion vehicles, submersibles, floating craft and fixed or floating platforms") is a good example.

466. This reflects the fact that it is inappropriate in the context of the regulation of the activities of vessels to try to force a distinction between "vessels navigating" and "vessels engaged in the exploitation of seabed resources": a vessel might fall into both categories. The 1972 Collisions Regulations, for instance, include dredgers (to which vessels recovering deep sea bed minerals are assimilable) within the category of vessels. Their inclusion is appropriate because such craft are navigating while they are collecting seabed resources. However, certain vessels cease navigating in order to recover or otherwise engage in the exploitation of seabed resources. MODUs are vessels of such a kind. While they are fixed to the seabed they are not navigating and do not behave like ships.

467. The appropriate distinction in the context of the regulation of navigation, therefore, is that drawn between MODUs which are, and MODUs which are not, navigating at the time in question. This distinction is drawn explicitly in several instruments. The 1976 ILO Convention on Minimum Standards in Merchant ships[1] stipulates that:

> "Article 1
>
> 1. Except as otherwise provided in this Article, this Convention applies to every sea-going ship, whether publicly or privately owned, which is engaged in the transport of cargo or passengers for the purpose of trade or is employed for any other commercial purpose.
>
> . . .
>
> 4. This Convention does not apply to —
>
> (a) ships primarily propelled by sail, whether or not they are fitted with auxiliary engines;
>
> (b) ships engaged in fishing or in whaling or in similar pursuits;
>
> (c) small vessels and vessels such as oil rigs and drilling platforms when not engaged in navigation, the decision as to which vessels are covered by this subparagraph to be taken by the competent authority in each country in consultation with the most representative organizations of shipowners and seafarers."

Here, oil rigs and drilling platforms may be excluded from the scope of the Convention by the flag State, but only when they are not engaged in navigation.

468. The same distinction is drawn in other treaties. The 1976 INMARSAT Convention excludes from the definition of a ship platforms which are "permanently moored"[2]. The 1989 International Convention on Salvage[3] also excludes them, in more precise terms. Article 3 of that Convention states that:

> "This Convention shall not apply to fixed or floating platforms or to mobile offshore drilling units when such platforms or units are on location engaged in the exploration, exploitation or production of seabed mineral resources."

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[1] Geneva, 29 October 1976, 15 *International Legal Materials* 1288 (1976).

[2] Convention on the International Maritime Satellite Organization, London, 3 September 1976, 1143 UNTS 105, article 1.

[3] London, 28 April 1989, 14 *United Nations Law of the Sea Bulletin* (December 1989), p. 77.

Such platforms and units are within the definition of vessels in article l(b) of the 1989 Convention when they are not so located and engaged. Article l(b) provides that "vessels means any ship or craft, or any structure capable of navigation."

469. This is underlined by the fact that during the negotiation of the 1989 Salvage Convention, as the Conference records note:

> "The Committee decided to amend sub-paragraph (b) by inserting the word "any" before the word "structure", in order to make it clear that the phrase "capable of navigation" should be understood as a qualification only with regard to the term "structure", and not with regard to the term "ship"." [1] The question whether a structure is a vessel is made to turn on the functional criterion of the fact its capability of engaging in navigation, and not on any other characteristics of its shape or design.[2]

470. One of the fullest international discussions of the distinction between platforms which are and platforms which are not ships occurred during the negotiation of the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Navigation.[3] There the line was drawn between "a vessel of any type whatsoever not permanently attached to the sea-bed" which, as a ship, is covered by the 1988 Convention itself[4], and "an artificial island, installation or structure permanently attached to the sea-bed for the purpose of exploration or exploitation of resources or for other economic purposes", which is a "fixed platform" covered by the 1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf.[5]

471. The distinction in the 1988 Convention and Protocol, which treats platforms operating on location but not *permanently* attached to the sea-bed as ships, perhaps goes further than the current general practice. The generally accepted distinction regards such platforms as ships when they are navigating, usually from one drilling site to another or to or from a shipyard, but not when they are operating on location, whether or not they are "permanently" attached to the sea-bed. This generally accepted distinction is epitomised by the terms of a note to IMO Resolution A.671(16). That note reads as follows:

> "For the purpose of this resolution mobile offshore drilling units (MODUs) used for exploratory drilling operations offshore are considered to be vessels when they are engaged in transit and not engaged in a drilling operation, but are considered to be installations or structures when engaged in a drilling operation."

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[1] Note on article 1, IMO Doc. LEG/CONF.7/CW/RD/2, 19 April 1989.

[2] Cf., the International Convention on Oil Pollution Preparedness, London, 30 November 1990, 30 *International Legal Materials* 733 (1991), article 2, which distinguishes between offshore installations and vessels in general only to the extent that the installations are engaged in exploration and exploitation activities.

[3] Rome, 10 March 1988, 27 *International Legal Materials* 672 (1988).

[4] Article 1.

[5] 27 *International Legal Materials* 685 (1988), article 1.

B. CONCLUSIONS FROM TREATY PRACTICE

472. International treaty practice provides no warrant for the application of any criterion other than a capability of navigation at sea, or perhaps an actual engagement in navigation at sea, in determining whether or not a given craft counts as a ship or vessel.

473. It may be said that in the absence of an authoritative and general definition of the terms "ship" and "vessel" a purposive interpretation must be adopted, admitting that the definition may vary from one context to another.[1] Such an approach would be supported in the context of treaties by the provisions of the Vienna Convention on the Law of Treaties concerning treaty interpretation.[2] However where, as in the present case, the question is one of rights of navigation, the conclusion must be the same: the question whether a given craft does or does not qualify as a ship so as to enjoy rights of navigation must depend on its capability of navigation at sea, or perhaps its actual engagement in navigation at sea.

474. Drill ships and semisubmersibles plainly satisfy this criterion. They are capable of navigating at sea, and indeed are designed specifically to navigate at sea; and they do in fact navigate at sea.

475. Jack-ups are more problematic. They are designed to be towed at sea, either by heavy lift barges or by tugs. When towed by a heavy lift barge they constitute the cargo of that barge. As such they partake of the right of passage of the barge.[3] This was made explicit in early formulations of the right of innocent passage, which stipulated that ships, their passengers and cargo enjoyed that right.[4] Although this is not expressly stated in the 1958 Territorial Sea Convention or the 1982 UN Convention on the Law of the Sea, it is absurd to suggest that a ship enjoys the right of passage but its cargo does not. There is no evidence in national legislation or treaty-making practice of rights of passage being dependent upon ships bearing cargo of any specific size.

476. The position is different in relation to jack-ups which are under wet tow or which are being towed on a barge. There is no evidence establishing the existence of a general requirement that a ship, for the purposes of international law, be capable of navigation under its own power. The 1986 UN Convention on the Conditions for Registration of Ships is unusual in defining ships as "self-propelled" vessels, and other instruments, such as the 1972 Collision Regulations, clearly contain no such requirement. There is, therefore, no justification for excluding jack-ups from the category of ships on the basis that they cannot navigate under their own power. Indeed, the 1972 Collisions Regulations explicitly treat tug and tow as two vessels:[5] the fact that the tow may be unable to move under its own power is irrelevant.

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[1] See D.P. O'Connell, *The International Law of the Sea*, vol. II (ed I.A. Shearer) (1984), p. 749.

[2] 23 May 1969, 1155 UNTS 331, Articles 31-33.

[3] Cf., Rule 24 of the 1972 Collisions Regulations, 1050 UNTS 16, 1143 UNTS 346, which treats a tug and her tow as a (single) power driven vessel when they are "rigidly connected in a composite unit".

[4] See, for instance, M. Schücking's Memorandum to the Sub-Committee of the League of Nations Committee of Experts for the Progressive Codification of International Law, League of Nations Doc. C.196.M.70. 1927. V, April 20, 1927, p. 71; A.S. de Bustamante y Sirven (trans P. Goulé), *La mer territoriale* (1930), para. 175.

[5] See, for example, Rule 24 of the Collisions Regulations, which sets out the requirements for both the towing vessel and her tow.

477. It may be thought that there is, or ought to be, a distinction between vessels capable of navigation under their own power and those not so capable, with the effect that jack-up barges are not to be regarded as vessels. However, the definitions of the terms "ship" and "vessel" in international treaties do not compel the conclusion and, as is shown below, municipal practice does not support any such requirement. International practice has not so far excluded jack-up barges from the category of ships.

478. Even if international law were to require a capability of navigation under its own power in order that a craft qualify as a ship, it would not, of course, necessarily follow that non-powered craft have no rights of passage. Rights of passage might apply equally to ships and non-powered vessels. Alternatively, non-powered vessels might have an independent right of passage, established by the consistent and repeated practice of States in allowing them to navigate unhampered through the territorial sea in the same manner as conventional ships. Or, thirdly, a towed jack-up might be held to partake of the right of passage of the tug, on the basis that it is cargo, or that it and the tug are a single navigating unit for this purpose or, again, on the basis that State practice clearly establishes that towed jack-ups are treated as having a right of passage. Whatever legal characterization might be adopted, the fact that towed jack-ups are treated in a manner consistent with their possessing a right of passage is undeniable.

C. THE DEFINITION OF SHIPS IN NATIONAL LAW AND DOCTRINE

479. The concept of a ship or vessel in treaty-making certainly extends to drill ships and semisubmersible platforms and arguably to jack-ups. The definition of ship adopted in municipal law is similarly broad.

480. Most national legislation concerning the territorial sea explicitly affirms the right of navigation or of innocent passage. In some cases, this right is phrased in general terms, in others it is applied to "all ships" or "all ships other than warships".[1]

481. Unless they are anchored or permanently fixed to the sea-bed in areas of national jurisdiction,[2] or unless they are engaged in the actual exploration or exploitation of the resources of the sea-bed of the coastal state,[3] there is no tendency to exclude drill ships, semisubmersibles or jack-up drill barges from the definition of ships in the applicable national legislation. On the contrary, those pieces of national legislation which define the words "ship" or "vessel" tend to employ the broadest terms which could not conceivably be interpreted to exclude such vessels. This applies both to legislation concerning the territorial sea generally, and specialized legislation dealing with issues such as pollution, fisheries, customs regulation, etc.

482. Some national jurisdictions establish special restrictive regimes for the passage of warships, nuclear ships and ships carrying ultra-hazardous substances. MODUs are generally not subject to such special treatment while in transit.[4] In a few cases, the coastal

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[1] As in international usage, the terms 'ship' and 'vessel' are often used interchangeably. E.g., the report of the Chairman of the Drafting Committee of the Third United Nations Conference on the Law of the Sea. A/CONF.62/40 UNCLOS III, Official Records, vol XII, p. 95, at 97.

[2] Coastal states frequently adopt specialized legislation for drilling platforms fixed to the seabed. However, such legislation is not relevant in the context of this memorial, which addresses the *navigational* rights of MODUs. In municipal case law floating structures fixed in one place are also generally excluded from the definition of ships, see, *e.g.*, *The Gas Float Whitton* No. 2, [1897] A.C. 337 (H.L.). *The Normandy*, [1904] P. 187; *The Upcerne*, [1912] P. 160; *The Blow Loat*, [1912] P. 217; *Mac Donald v. Santa Fe Intl.*, 1981 AMC 536; *Dresser Ind. v. Fidelity and Cas.*, 1978 AMC 2588; In *Stephenson v. McLean Contracting*, 1988 AMC 2640, a crane barge capable of moving along its own anchor lines was held not to be a vessel. However, that case is distinguishable, as the barge in question was constrained in its ability to move by fixed cables and therefore unable to navigate freely. When navigating, MODUs are free from such constraints.

[3] The right of coastal states relating to the regulation of exploration or exploitation of natural resources on the sea-bed are of course of a different and wider nature than the rights relating to the possible interference with the freedom of navigation. Thus, all of the jurisdictions surveyed below permit the passage of MODUs, although some would apply specialized, and possibly more restrictive legislation, should MODUs engage in exploration or exploitation, *see, e.g.*, Part XV, subsection 655 (2) of the Canadian Shipping Act, and Douin, *Etat actuel des législations nationales en matière d'utilisation des fonds marins*, (1985) esp. pp.38 *et seq.*

[4] Norwegian legislation (Royal Decree of 1965, reproduced in the Annex) requires notification of the movement of drilling platforms intended for use in areas under Norwegian jurisdiction. However, this stipulation does not require notification for platforms not intended for *use* in Norwegian waters, *i.e.* it does not apply generally to MODUs in transit. Furthermore, the Norwegian Decree requires notification, not authorization. This practice is in line with international standards aimed at enhancing safety of navigation, rather than precluding navigation. See the *IMO Recommendation on Safety Zones and Safety of Navigation around Offshore Installations and Structures*, under which coastal States authorizing the operation of offshore installations and structures should "require operators of MODUs to provide advance notice of any change of their location to the appropriate authority of the coastal State so as to allow timely issue of relevant Notices to Mariners": IMO Res.A.671(16), Annex, Article 1(1).

State may require prior notification for reasons of safety when oil rigs are being towed through certain areas of its territorial sea, because of their restricted ability to manoeuvre. However, in that case they are treated just like other ships which are similarly restricted, and their right of passage is not in question.[1]

1. Elements of Definitions in National Law

483. A number of legislative acts simply define a vessel as a structure capable of flotation.[2] Undoubtedly all MODUs would satisfy this criterion. Such a broad definition is also reflected in the views of leading writers on the subject. Duckworth notes that the word 'ship' "does not limit its meaning, but rather enlarges it."[3] Caron finds that the "customary international law definition would be quite encompassing."[4] The specialized literature explicitly includes drilling ships, semisubmersibles, and, to an extent, jack-up rigs in the definition of ships. Wylie Spicer, a lecturer in Maritime Law at Dalhousie University, concludes: "The debate about whether a self-propelled semisubmersible is a ship must now be over – it is a ship."[5]

2. The requirement of 'navigation'

484. Many definitions in national legislation refer to the functional criterion of vessels capable of, or engaged in navigation. The functional approach is also supported in municipal law jurisprudence and doctrine. It is well established in common law jurisprudence that "every vessel that substantially goes to sea is a ship."[6] A similarly broad approach is evidenced in civil law jurisdictions.[7] And, in more recent cases, MODUs have been found

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[1] E.g., the US Navigation Rules, Rule 3(q) (vi). "The term 'vessels restricted in their ability to manoeuvre' shall include but not be limited to: a vessel engaged in a towing operation such as severely restricts the towing vessel and her tow in their ability to deviate from the course she is following."

[2] Sometimes reference is made to the fact that it must be a hollow structure—a criterion fulfilled by MODUs.

[3] *The Principles of Maritime Law* (1930) p. 1; further references to the literature are given below.

[4] Ships, Nationality and Status, in Bernhardt (ed.), 11 *Encyclopedia of Public International Law* (1989) p. 290.

[5] Canadian Maritime Law and the Offshore, 15 *Journal of Maritime Law and Commerce* (1984)p. 489. The American Law Institute even includes fixed installations: "Oil drilling platforms and similar fixed installations are in some respects subject to the law of the sea and maritime law as if they were ships." 2 *Restatement of the Law, the Foreign Relations Law of the United States*, p. 12. On the other hand, as indicated, above international conventions and national legislation tend to exclude fixed installations and installations or devices engaged in the exploration and exploitation of the resources of the sea-bed and the ocean floor from the definition of the term 'ship'. MODUs in transit are of course neither fixed to the ocean floor nor engaged in the exploration or exploitation of such resources.

[6] *Ex p. Ferguson*, (1871) L.P. 6 Q.B.280; further cases are cited below.

[7] *E.g.*, the German *Bundesgerichtshof*, 1952 NJW 1135; and the French *Cass.*, 1844, I, 197. It may be noted that in a commentary to the Danish Maritime Act, it is stated that in principle, any vessel (in Danish "fartøj") irrespective of its size, type or use may be considered a ship ("skib") under the Act. It is added, though, that further characterization may ensue from the more specific rules of the Act. *Søloven med kommentarer ved Jørgen Bredholt og Allan Philip*, (1986), p. 63.

to fall within the functional criterion of capability of, or use in navigation. For example, in *In re Seafarers' International Union of Canada v. Crosbie Offshore Services, Ltd.*, Judge Thurlow of the Canadian Federal Court of Appeal pointed out with respect to oil rigs: "The rigs are also ships. They have means of self-propulsion but for one reason or another may be towed to a drill site."[1] This view has also been maintained with consistency in other jurisdictions, in particular the United States.[2]

485. Writers too have followed the functional approach. In the words of Gidel, it is "l'aptitude à la navigation" which furnishes the decisive element of the definition.[3] Gidel adds: "il semble pouvoir ressortir que le navire de mer de surface n'est pas seulement tout engin flottant, mais tout engin, quelles que soient ses dimensions et sa dénomination, apte à se mouvoir dans les espaces maritimes (à l'exclusion des autres milieux) avec l'armement et l'équipage qui lui sont propres en vue des services que comporte l'industrie à laquelle il est employé." Lazaratos, in an article devoted to the *Definition of Ships in National and International Law*, concludes that "the ability to navigate is the paramount test."[4]

486. Some pieces of national legislation refer to 'vessels capable to navigate', while others cover vessels 'used in navigation'. Technically, there might be a distinction between these two concepts. A vessel 'capable' of navigation would include any detached or detachable structure which floats, even if it is never moved, while a vessel 'used' in navigation must actually be employed in movement in water. However, this distinction is not maintained with any consistency in municipal law. For example, the Australian Navigation Act covers vessels used in navigation, while the Australian Shipping Registration Act applies to vessels capable of navigating. The Netherlands Act Regarding Shipping Traffic refers to both requirements simultaneously, covering any vessel 'which actually is used or suitable to be used as means for movement by water'. Some legislative acts apply explicitly to vessels which are 'sea-going' or 'ocean going'.[5] It is not clear whether this

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[1] (1982) 135 D.L.R. (3rd 485 (F.C.A.).

[2] *E.g.*, *Offshore Co. v. Robinson*, 1959 AMC (5th Circuit); *Producers Drilling Co. v. Gray*, 1966 AMC 1260 (5th Circuit); *A-1 Industries Inc. v. Barge Rig # 2*, 1979 AMC 1486 (E.D. Louisiana); *In re Complaint of Sedco*, Inc., 1982 AMC 1461, 21 *International Legal Materials* (1982), p. 318 (S.D. Texas).

[3] 1 *Le droit international public de la mer* (1932), p. 65. See also, e.g., Nguyen Quoc, Dallier, Pellet, *Droit international public* (1987), p. 958; Bredholt and Philip, *Søloven med Kommentarer* (1986) p. 63; Soederquist, *Droit international maritime* (1930), p. 156; Calvo, 2 *Dictionnaire de droit international* (1885), p. 11.

[4] 22 *Rev. Hellenique de droit international* (1969), p. 78. For this reason, Lazaratos would deny that platforms engaged in exploitation and fixed to the seabed are ships. See also C.A. Fleischer, *Petroleumsrett*, (1983), p. 342. It may be noted that in mid-seventies a Norwegian governmental Committee on the law applicable to drilling craft, rigs and platforms prepared a Report discussing the legal nature of such craft. The Report concludes (NOU 1976:59, p. 16) that in some situations a drilling platform takes much similarity to a "ship", while in others the same is not the case. The Report continues to note that there was no general proviso to determine to what extent the rules and regulations on ships in the Norwegian Maritime Act and other relevant acts were also applicable to drilling platforms. According to the Report, one had to study *in casu* the individual rules to ascertain their applicability, and that in some cases drilling platforms would correspond to ships while in others they would not. *Privatrettslige regler for borefartøyer. Norges offentlige utredninger, NOU 1976:59.*

[5] E.g., Barbados, Maritime Boundaries and Jurisdiction Act, 1976; Grenada, Maritime Boundaries Act, 1976; Japan, Marine Pollution Prevention Law, 1970. The term 'sea-going' has been interpreted to indicate navigation beyond internal waters, *Big Foot Two Lim. Procs.*, 1989 AMC 1004, 1008.

criterion would be of an objective or subjective nature, i.e., whether it relates to the abstract capability of navigating on the high seas or to the practice of actually navigating the oceans. In any event, MODUs would fulfill both the objective and the subjective test. By design, they are capable of long-distance navigation, and by definition they are engaged in navigation when attempting to exercise the right of passage through waters under national jurisdiction.

487. The subjective criterion of vessels 'used' in navigation might be interpreted to mean that the primary use of a vessel must be that of navigation.[1] Generally, municipal law courts tend to require evidence only of occasional use in navigation, or even only actual use in navigation at a single point in time when the structure in question was involved in the events giving rise to the judicial proceedings.[2]

488. In *Qualls v. Arctic Alaska Fisheries*, the US District Court, District of Alaska, affirmed that "Courts have found that the vessel does not have to be actually plying the waters for it to be 'in navigation'," adding that: "generally the 'in navigation' requirement is used in the broad sense not strictly confined to those vessels that actually navigate or move, but can include those vessels that are engaged as instruments of commerce or transportation in navigable waters."[3]

489. In 1982, the US District Court, Southern District of Texas, was faced with the necessity of defining the character of a ship in litigation arising from the Ixtoc I oil well disaster. It summarized the criteria relating to the capability of, or use for navigation in the following way when it investigated whether an oil rig could be considered a vessel: "Thus as the law has evolved, several factors have emerged as indicia of whether a craft is a vessel under the [US Limitation of Liability] Act. First, the craft must be built with the intent that it be used in navigation as a means of transportation. Second, the contrivance must not be permanently attached to the shore or seabed. Finally, the craft must be subject to the perils of the sea. Comparing these factors to the craft in question, the Court finds the *Sedco 135* semisubmersible rig to be a vessel under the Limitation Act."[4] The Court added that "semisubmersible drilling rigs long have been held vessels for other statutory purposes."[5]

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[1] Examples of such a requirement in national legislation are rare, and they mostly relate specifically to maritime commerce, which is not of direct relevance to MODUs. *E.g.*, Morocco, Code de Commerce Maritime: "Le navire est le bâtiment qui pratique habituellement cette navigation". In *Merchants' Marine Insurance Co. Ltd v. North of England Protecting & Indemnity Association*, [1926] 25 Ll.L.R. 446, Roche, J. dealt with a case where the primary purpose for which a platform had been designed was "to float and to lift, and not to navigate". He denied that the platform was a ship because "whatever other qualities are attached to a ship or vessel, the adaptability for navigation, and its use for that purpose, is in my judgement one of the most essential elements." However, this case related to a pontoon, moored to a river bank by chains, which was almost impossible to move, and had only been observed to do so once.

[2] *E.g.*, *Patton-Tully Transportation Company v. Turner*, 269 F. 334 (6th Cir. 1920); *The Craighall, [1910]* P. 207 C.A.); *In re Great Lakes Transit Corporation*, 53 F2d 1022, 1931 AMC 1740 (E.D. Ohio 1931); affirmed in 63 F.2nd 849; 1933 AMC 1019 (6th Cir. 1933); *Marine Craft Constructors Ltd. v. Erland Blomqvist (Engineers) Ltd.*, [1953] 1 Lloyd's Rep. 514; *Cook v. Dredging & Construction Co. Ltd., [1958]* Lloyd's Rep. 334; *The Queen v. St John Shipbuilding & Dry Dock Co.* (1981), 126 D.L.R. (3d) 353, 362 (F.C.A.).

[3] 1911 AMC 582. Also *Wheeling Pittsburgh Steel Corp.*, 1975 AMC 2527; 1976 AMC 1499; *Ramos v. Universal Dredging Corp.* 547 F.Supp. 661, 664 (D.Haw. 1982).

[4] In *Drilling Unit Sedco 135*, 1982 AMC 1461, 21 *International Legal Materials* (1982), p. 318 at 337.

[5] Id., at 334, relying on *Offshore Co. v Robison*, 266 F.2d 769, 779 (5 Cir. 1959).

490. Applying the three elements of the test enunciated in the *Sedco* case, it is clear that MODUs of all types are fully covered by the definition of ships. They have been specifically designed to allow for movement in water; they are obviously not attached to the seabed while moving; and they move through maritime spaces, often for considerable distances. Even jack-up rigs change location with some frequency, both within particular drilling areas and sometimes for transcontinental relocation or refurbishment.

3. Used for Purposes of Transport

491. It is occasionally required that a vessel must be engaged in transport of goods and persons, in fishing or other particular activities.[1] This requirement can usually be explained with reference to the fact that the legislation in question tends to be specialized, dealing with maritime transport regulation, fisheries, etc. While such legislative measures should therefore not be taken to indicate that there is a general criterion requiring vessels to be used for transport of goods or persons in order to qualify as ships, MODUs would in any event fulfill this criterion. They are designed precisely in order to transport drill rigs, accommodation units, or other offshore equipment from place to place. Hence, a MODU moving by itself, or being moved in wet or dry-tow, is of course engaged in transport. This was specifically affirmed in the *Sedco* case, where the US District Court, Southern District of Texas, held that a semisubmersible drilling platform "was built and utilized as an ocean-going vessel in navigation as a means of transporting a fixed cargo".[2]

4. Means of Propulsion

492. The Australian Navigation Act, as amended, includes MODUs in its general definition of ships, but specifically excludes those MODUs which are not self-propelled. The Venezuelan Shipping Act requires an 'integrated means of propulsion'. However, a substantial number of other legislative acts explicitly exclude the means of propulsion as

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[1] French doctine distinguishes between le navire and le bâtiment. "Le navire, bâtiment de mer, est aussi plus que cela. Outre son aptitude à affronter le peril marin, il se caractérise par sa fonction, qui est de transporter des personnes ou des biens. Cette condition est necessaire et suffisante pour valoir à un bâtiment de mer la qualification de navire." Remond-Gouilloud, *Droit Maritime* 42 (1985). However, the same author confirms with respect to *plates-formes de forage*: "Ces bâtiments sont, comme les navires, isolés et exposés au peril marin: leur mode de construction et leurs amenagements montrent qu'ils y sont destinés. Aussi certaines règles maritimes, à l'origine conçues pour les navires, on vocation à les regir: ces sont celles qui sont commandées par le peril marin: règlements de securité, assistance ou règles pour prévenir les abordages. D'autres règles maritimes en revanche n'ont pas lieu de les intéresser: ce sont celles qui sont justifiée par le role du navire, qui est de transporter." Id., at 39. In addition, some parts of French legislation explicitly include "les plates-formes flottantes et tous engins flottants, qui soient auto propulsés ou non" in the definition of the term *navire*, *(see* Annex 78). In *Presly v. Healy Tibbits Construction Co*, 1988 AMC 1894, the US District Court, District of Maryland affirmed that in order to be "in navigation" a vessel must be performing the function of transporting people or things in commerce. That case related particularly to the application of the US Jones Act and the position of a worker as a "seaman" in the context of merchant shipping. Still, in consistent practice this requirement of transportation of people or things has been interpreted broadly, e.g., *Offshore Co. v Robison*, "a vessel may mean more than a means of transport on water." 266 F2d 769, 776 (5th Cir. 1959). Also *The Mac*, (1882) 7 P.D. 126, 131 (C.A.), Cotton L.J.: "The question cannot depend on the circumstance whether she carries a cargo from port to port."

[2] 1982 AMC 1461, 1474; 21 *International Legal Materials* 318, 337.

a criterion for the definition of ships (with the occasional exception of vessels propelled by oars).[1] Some definitions explicitly include vessels in tow.[2] It has long been established in the jurisprudence of municipal courts that "when the definition of the word 'ship' is considered", there is nothing to indicate that a craft "must at the time possess independent practical power of moving herself."[3] Towed barges without independent means of propulsion have been treated as ships in numerous cases.[4] And MODUs have been similarly subsumed within the definition of ships, even while in tow, in such decisions. In *Rogers vs. Graceys Hellums Corp.*, it was held that "Rig. No 4 is a submersible inland drilling barge. Lacking motive power, it is towed to and from locations by tug. ... The Court finds that the barge was a vessel".[5]

5. Conclusion

493. By far the largest number of legislative instruments surveyed here contain broad criteria for the definition of ships which would in principle include everything that floats. Even the more specific elements of the definition of ships which can be found in some pieces of legislation and in municipal court cases and the opinions of learned writers are satisfied by MODUs. MODUs are capable of flotation and navigation; they are not permanently attached to the sea-bed; and while in transit they are 'used in navigation' for the purpose of transport.

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[1] Bulgaria, Decree of 1951; Canada, Arctic Waters Pollution Act, Admiralty Act; Colombia, Maritime Commercial Code; Cook Islands, Territorial and Exclusive Economic Zone Act; France, Loi n. 76-600; Federal Republic of Germany, Act of 1977; Ireland, Maritime Jurisdiction Amendment Act; New Zealand, Marine Pollution Act, Oil in Navigable Waters Act; Spain, Act no. 21/1977; Tuvalu, Fishing Ordinance; UK, Fishing Boats Designation Order, Fisheries Limits Act; USA, Public Law 95-372; Western Samoa, Exclusive Economic Zone Act; (a number of other legislative acts, by ruling out vessels propelled by oars, imply that all other means of propulsion are covered).

[2] Finland, Order No. 710/1972 (now replaced by a definition based on MARPOL, see act No. 746/1983); See also the Finnish Act of Shipping Registration, No. 211/1927 (as amended) and the Law on Civil Liability for Damage Caused by Pollution by Oil, 401/1980; Oman, Marine Pollution Control Law, 1974; US Navigation Rules, Rule 3 (g)(vi), which includes vessels in tow in the category of vessels restricted in their ability to manoeuvre.

[3] *St John Pilot Commissioners v. The Cumberland Railway and Coal Co.* [1910] A.C. 208, 218 (P.C.).

[4] *The Mac*, (1882) 7 P.D. 126, 131 (C.A.), affirmed in *The Lighter No. 3, (1902)*, 18 T.L.R. 322; *The Mudlark*, (1911) P. 116; *The St. Machar*, [1939] 64 Ll.L.R. 27; on appeal, [1939] 65 Ll.L.R. 119. This includes barges or pontoons carrying specialized equipments such as cranes. *The Titan, (1923)* 14 Ll.L.R. 484; *Marine Craft Constructors Ltd. v. Erland Blomquist (Engineers) Ltd., (1953)* 1 Lloyd's Rep. 514; *The Queen v. St. John Shipbuilding & Dry Dock* Co., a Canadian case, at 126 D.L.R. (3rd) 353 (F.C.A.); *Orgeron v. Avondale Shipyards*, 1991 AMC 338. Meyers, while doubting that a single definition can be found to fit all circumstances, suggests that one might consider as a ship, by way of a starting point for a definition, "all seaworthy objects, including such as are incapable of traversing the sea otherwise than with the aid of a tug (floating drilling platforms, ships deprived of their means of propulsion, abandoned ships adrift which are still seaworthy, etc) ... ." *The Nationality of Ships* (1967) p. 22.

[5] 1971 AMC 956.

D. STATE PRACTICE IN DEALING WITH SHIPS

494. Treaty-making practice and State practice in the form of municipal legislation accord in regarding drill ships, semisubmersibles and jack-ups capable of navigation as ships. However, this may not be decisive. As Judge Read observed in the *Anglo-Norwegian Fisheries* case in the context of the evaluation of State practice concerning claims to maritime jurisdiction:

> " Customary international law is the generalization of the practice of States. This cannot be established by citing cases where coastal States have made extensive claims, but have not maintained their claims by the actual assertion of sovereignty over trespassing foreign ships.....
>
> The only convincing evidence of State practice is to be found in seizures, where the coastal State asserts its sovereignty over the waters in question by arresting a foreign ship and by maintaining its position in the course of diplomatic negotiation and international arbitration."[1]

495. The evidence afforded by treaty-making practice and municipal legislation must be viewed in the light of the manner in which States in fact act. Were there to be substantial evidence that States distinguish for the purposes of rights of navigation and passage between conventional ships and drill ships, semisubmersibles or jack-up barges, the inference drawn above from the treaties and legislation might be open to question. On the other hand, if States consistently draw no such distinction, the conclusion that drill ships, semisubmersibles and jack-up barges are ships for the purposes of navigation and passage rights must be regarded as firmly established in customary international law.

496. Actual practice confirms the conclusion that drill ships, semisubmersibles and jack-ups are treated as ships for the purposes of navigation and passage. As the annexed details[1] demonstrate, passages through straits by MODUs are common. The main straits through which MODUs have passed are the Bass, Danish, Dover, Gibraltar, Hormuz, Magellan, Malacca, Sunda, and Torres straits[2].

497. Not one single case is known in which the permission of the coastal State has been sought for the mere passage of a drill ship, semisubmersible or jack-up barge through a strait. Not one single case is known in which the permission of the coastal State has been sought for the passage of a drill ship, semisubmersible or jack-up barge through territorial waters. In every known case rights of passage are exercised by drill ships, semisubmersibles and jack-up barges in exactly the same manner as by merchant ships of conventional design.

498. Nor is any case known in which prior notification has been given to a coastal State in advance of mere passage by a drill ship, semisubmersible or jack-up barge, unless for the purpose of obtaining services such as pilotage or in order to comply with the requirements of a reporting-in system such as that operating in the Dover Straits, in which cases notification is given in the same manner as it is given by merchant ships of conventional design. No case is known in which notification has been given in circumstances which might cast doubt on the right of passage.

499. Nor is any case known in which any coastal State has treated a drill ship, semisubmersible or jack-up barge in any way differently from merchant ships of conven-

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[1] *ICJ Reports 1951*, p. 191.

[2] Annex 36.

tional design in relation to the exercise of rights of passage or navigation. The practice of the authorities in the United Kingdom responsible for supervising navigation through the Dover Straits, which are the international straits most frequently transitted by MODUs, and of the authorities in States such as Malaysia, Mexico, the Netherlands, and Singapore is to require them to comply with the 1972 Collision Regulations in exactly the same manner as other ships.[1]

500. MODUs are commonly entered upon the same registers as conventional ships. This is the case in, for example, Denmark, Mexico, Norway and the USA. In insurance matters the practice is to insure drilling vessels and drilling rigs under Hull and Machinery clauses as a marine risk. In all relevant respects international practice is to treat MODUs in the same manner as ships of conventional design, at least while they are not attached to the seabed or engaged in exploration and exploitation activities.[2]

501. The attitude of States to MODUs is exemplified by a passage from the decision of the US court in the *Sedco* case:

> "The SEDCO 135 was built in 1965 at the Ingalls Shipyard in Mississippi and between that time and 1979, when she was scuttled, she made two trans-atlantic voyages and eleven long ocean voyages, logging a total of 15,947 miles in navigation. These journeys took her to the waters off Portugal, then to the coast of Africa and eventually to the Bay of Campeche. During these voyages the SEDCO 135 was subject to all perils of the sea and without question would have been considered a vessel under the Limitation Act had an accident occurred during her travels. Additionally, she was designed to transport cargo, albeit a permanent one, throughout her voyages.
>
> The SEDCO 135 was registered as a United States vessel engaged in foreign commerce pursuant to federal law. She was inspected by the U.S. Coast Guard and surveyed on an annual basis by the American Bureau of Shipping. Moreover, she was subjected to a preferred ship mortgage. Clearly, she was built and utilized as an ocean-going vessel in navigation as a means of transporting a fixed cargo."[3]

502. The practice of treating drill ships, semisubmersibles, jack-up barges and merchant ships of conventional design alike, without drawing any distinction between them so far as rights of passage are concerned, is the critical element as far as the ambit of the right of passage through the Danish straits is concerned.

503. Whether the right of passage of MODUs is regarded as flowing from their status as ships, or from a distinct right established in State practice, is a matter involving the imposition of a legal characterization upon an established practice. Whatever characterization may be adopted, it is evident that MODUs have a right of passage.

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[1] Similarly, the regulations on passage through the Panama Canal distinguish two basic kinds of vessel: those which are self-propelled and those which are not. See Panama Canal Commission, *Marine Director's Notice to Shipping* No. 1-91.

[2] This position is also accepted in international fora not specifically concerned with navigation. See, for instance, the International Labour Organization, 71st Session, Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (Part 4A), 1985, p. 12. Also drilling rigs under tow are insured under Hull and Machinery clauses as a marine risk like any other ships. See Annex 82.

[3] US District Court, Southern District of Texas, *In the Matter of the Complaint of Sedco, Inc.*, 21 *International Legal Materials* 318, at pp. 337-338.

E. CONCLUSIONS

504. International law contains no authoritative definition of a ship.

505. International treaty practice includes within the category of a ship all craft which float and navigate, or are capable of flotation and navigation, upon the sea, at least while they are not attached to the seabed. These criteria are fulfilled by MODUs and other large ships which must pass through the Great Belt in order to enter or leave the Baltic Sea.

506. Municipal legislation commonly includes within the category of a ship all craft which float and navigate, or are capable of flotation and navigation, upon the sea, at least while they are not attached to the seabed or engaged in exploiting its resources. These criteria are fulfilled by MODUs and other large ships which must pass through the Great Belt in order to enter or leave the Baltic Sea.

507. State practice treats MODUs and other large ships which must pass through the Danish straits in order to enter or leave the Baltic Sea in the same manner as conventional ships as regards their rights of passage.

508. MODUs and other large ships which must pass through the Danish straits in order to enter and leave the Baltic Sea have been passing without permission or hindrance through these and other straits for many years. Regardless of their classification, that practice establishes that they have a right of passage through straits used for international navigation.

CHAPTER III

ALLEGED ACQUIESCENCE BY FINLAND IN THE BUILDING OF THE GREAT BELT BRIDGE IN ITS PRESENTLY PLANNED FORM

Section I. Introduction

509. It must be anticipated that Denmark will contend that Finland has somehow acquiesced in the building of a bridge over the eastern channel of the Great Belt in its presently planned form, and is therefore precluded from asserting that ships with a clearance of more than 65 metres, including drill ships, semisubmersibles, jack-ups, and reasonably foreseeable ships manufactured in Finnish shipyards have a right to free passage through the Great Belt. This contention is already foreshadowed in the Danish Written Observations of 28 June, 1991, submitted just prior to the oral hearings on the Finnish request for provisional measures. It is also foreshadowed in some of the statements made on behalf of Denmark at those oral hearings.

510. Thus, in the Danish Written Observations of 28 June, 1991, on Finland's request for an indication of provisional measures, it is recalled that Finland was directly informed of the Great Belt Project by Circular Notes in 1977 and 1987. It is then stated:

> "Other Baltic States reacted to these Notes, but no reaction was received from Finland" (para. 36).

Denmark concedes that on 18 July, 1989, Finland drew attention (by means of a letter from the Commercial Department of the Finnish Embassy in Copenhagen to the Danish Board of Navigation) to the fact that, according to available information, Finland's large transports e.q. drilling platforms with a free height of 150 metres, would be obstructed by the new bridge (para. 37). Likewise, Denmark also concedes that, in May, 1990, Finland requested informal talks to discuss aspects of international law pertaining to the passage of drilling platforms through the Great Belt, and that on 19 June, 1990, the Embassy of Finland sent a Note to the Danish Ministry of Foreign Affairs stressing that the proposed bridge over the eastern channel of the Great Belt would impede the transit of drilling platforms through the Great Belt (paras. 38 and 39).

511. Perhaps more directly in point is the argument advanced at paras. 130 to 132 of the Danish Written Observations of 28 June, 1991. In para. 130, Denmark rhetorically refers to the "striking passivity" of Finland as regards Danish plans for a fixed link over the Great Belt, pointing out that Finland has had diplomatic representation in Copenhagen since 1918. In para. 131, it is baldly stated:

> "The silence by Finland through all these years [*semble* since 1918] must be interpreted simply as acquiescence in Denmark's right to construct a high-level bridge across the Great Belt."

Denmark then proceeds to argue (in para. 132) that the real element of urgency arose in 1977 when the Danish Ministry of Foreign Affairs issued its first Circular Note on the Bridge Project. Denmark admits that the second Circular Note explicitly stated that a possibility existed to construct an immersed tunnel instead of the high-level bridge, but argues that "this was the last call" for States having problems for their ships passing the Danish straits to express and explain these problems to the Government of Denmark. The third Circular Note of 24 October, 1989, is characterised by Denmark as simply conveying "supplementary information", including the information that it had been decided to construct a high-level bridge of 65 metres over the East Channel; and it is specifically stated:

> "At that time the element of urgency would appear to have been overtaken by events in the sense that it would be almost impossible to stop even this part of the entire project."

512. A similar line is taken in various statements made by counsel for Denmark in the oral hearings on the Finnish request for provisional measures held in The Hague between 1 and 5 July, 1991. Thus, Ambassador Lehmann, in his statement of 2 July, 1991, argues *inter alia* that:

> "... the conduct on the part of Finland [*semble*, in not reacting to the Circular Notes of 1977 and 1987] should not be rewarded by indicating provisional measures against Denmark, *but should rather be considered as a factor which estops Finland from pursuing the matter further*." *(Emphasis supplied.)*

Mr Magid, in his presentation of 2 July, 1991, confined himself broadly to a presentation of facts which might be thought to sustain the argument that Finland had acquiesced in the construction of a high level bridge over the eastern channel of the Great Belt with a clearance of 65 metres. Finally, Professor Bowett, in his statement of 5 July, 1991, argues, in dealing with the question of urgency, that "it seems quite extraordinary that Finland should keep silent, knowing that Denmark would begin a scheme, spending millions and millions of dollars, and keep its protest until a point in time so late that Denmark was already committed" and that "where Governments believe their international legal rights are under threat, they have an obligation to speak out".

513. Although these Danish arguments are directed specifically towards the element of urgency inherent in a request for the indication of provisional measures, and although they were not adverted to in the Court's Order of 29 July, 1991, finding that the circumstances, as they now present themselves, were not such as to require the exercise of the Courts' power under Article 41 of the Statute to indicate provisional measures, Finland must assume that Denmark will resuscitate its arguments based on acquiescence at the merits stage. Finland is accordingly devoting this part of its Memorial to an analysis of these arguments in the firm conviction that they are unmeritorious in fact and in law.

514. There is not much dispute about the essential facts relevant to the Danish arguments about acquiescence; but there are significant and serious differences between Finland and Denmark as to how these essential facts are to be *interpreted*. Thus, Finland does not dispute that it received three Circular Notes from Denmark dated 12 May, 1977, 30 June, 1987, and 24 October, 1989. Nor does Finland dispute that it returned no formal reply to the first two of these Circular Notes, nor that the first Finnish reaction to the definitive Danish decision to construct a high level bridge over the eastern channel of the Great Belt with a clearance height of 65 metres was conveyed to Denmark in the letter of 18 July, 1989 from the Finnish Embassy in Copenhagen to the Danish Board of Navigation (Annex 61), followed by the Note of 19 June, 1990, from the Finnish Embassy in Copenhagen to the Danish Ministry of Foreign Affairs (Annex 64).

515. Finland proposes, first, to analyse the law relating to acquiescence and estoppel in the light of which the validity of the Danish arguments on acquiescence can properly be assessed, and, secondly (and more significantly), to analyse how the law should be applied to the particular circumstances of the present case.

Section II. The Law Relating to Acquiescence and Estoppel

516. Acquiescence is a concept which forms part of a series of principles of international law based upon and deriving from the conduct of a State party to an international dispute.

It is thus related to cognate principles such as estoppel or recognition, all three deriving from State conduct. For purposes of analysis, however, it is necessary to distinguish acquiescence from estoppel.

517. In a very recent judgment, a Chamber of the Court has drawn attention to some of the essential elements required by estoppel which it defines as:

> "... a statement or representation made by one party to another and reliance upon it by that other party to his detriment or to the advantage of the party making it[1]."

In that case, Nicaragua had presented a particular argument whereby it could be dispensed from producing evidence of the existence of the legal interests on which it relied by reason of certain assertions of fact and law made by El Salvador and Honduras in the proceedings which, it was contended, constituted recognition of the existence of major legal interests pertaining to Nicaragua. The Chamber found no evidence of estoppel in the pleadings of El Salvador and Honduras:

> "The indications to be found in the pleadings of the views of the Parties as to the existence or nature of Nicaraguan interests within or without the Gulf, no doubt amount to some evidence which the Chamber can take into account. None of these however amounts to an admission, recognition or statement that, in the view of the Party concerned, there are interests of Nicaragua such that they may be affected by the decision of the Chamber in the case."[2]

518. Bowett defines estoppel in terms which correspond closely to the definition given by the Chamber of the Court in its judgment on Nicaragua's application to intervene in the *Land, Island and Maritime Frontier Dispute*. Bowett states:

> "The rule of estoppel operates so as to preclude a party from denying the truth of a statement made previously by that party to another whereby that other has acted to his detriment or the party making the statement has secured some benefit: as such the rule has been accepted by international tribunals."[3]

519. In his specialised monograph on estoppel in public international law published more recently, Martin, having conducted a detailed survey of international case-law and doctrine, presents his own definition of estoppel, which is also expressed in suitably narrow terms:

> "On peut en donner la définition suivante, inspirée de la conception restrictive telle qu'elle paraît s'imposer aujourd'hui dans la jurisprudence internationale, des dicta de juges, des exposés de certains plaideurs et des observations de quelques auteurs: lorsqu'une Partie, par ses déclarations, ses actes ou ses comportements, a conduit une autre Partie à croire en l'existence d'un certain état de choses sur la foi duquel elle l'a incitée à agir, ou s'abstenir à agir, de telle sorte qu'il en est resulté une modification dans leurs positions relatives (au préjudice de la seconde ou à l'avantage de la première, ou les deux à la fois), la première est empêchée par l'estoppel d'établir à l'encontre de la seconde un état de choses different de celui qu'elle a anterieurement représenté comme existant."[4]

520. In order to found an estoppel, the representation of fact must be clear and unequivocal in the sense that it must reasonably support the meaning attributed to it by the

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[1] Judgment of 13 September, 1990, on Nicaragua's application to intervene in the case concerning *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), ICJ Reports 1990*, p. 30.

[2] *Ibid.*

[3] Derek Bowett, "Estoppel before International Tribunals and its relation to Acquiescence", 33 *British Year Book of International Law* (1957), p. 201.

[4] Antoine Martin, *L'estoppel en droit international public* (1979), pp. 259-260.

party raising the plea of estoppel; and that party must satisfy the court that it understood the statement to have that meaning. The rationale for this requirement would appear to be that suggested in a recent article on estoppel:

> "Clear and unequivocal representation, prejudice or detriment are not simply addenda; they trigger the very justification for specific protection of settled expectations. A rule of principle which would prohibit any modification of conduct, statement or representation vastly overestimates the potentials of law and is not even suitable or desirable in order to promote protection of good faith, reliance and confidence in international relations."[1]

521. An essential element in the rule of estoppel is that there must have been reliance in good faith upon the representation of one party by the other party to his detriment, or to the advantage of the party making the representation. Thus, in the *Serbian Loans* case, the question arose whether, by their conduct in accepting payment of interest upon the loans in French francs as opposed to "gold francs", the French bondholders had represented that they were prepared to accept payment in French francs. If they had, it was at any rate arguable that they were henceforth estopped from claiming payment according to the strict terms of the loans. The Permanent Court concluded that there had been no clear and unequivocal representation of the bondholders upon which the debtor State was entitled to rely. But the Court went further and stressed that there had in fact been no reliance by the debtor state on the alleged representation:

> "There has been no change in position on the part of the debtor state. The Serbian debt remains as it was originally incurred; the only action by the debtor state has been to pay less than the amount owing under the terms of the loan contracts."[2]

522. So also, the argument was advanced by Costa Rica in the *Tinoco* arbitration that Great Britain, by reason of its nonrecognition of the Tinoco government in Costa Rica, was estopped from asserting that the Tinoco government could confer rights which would be binding upon successor governments in Costa Rica. The sole arbitrator, Taft CJ, summarily dismissed this argument:

> "I do not understand the arguments upon which an equitable estoppel in such a case can rest. The failure to recognise the *de facto* government did not lead the succeeding government to change its position in any way upon the faith of it ... An equitable estoppel to prove the truth must rest on previous conduct of the person to be estopped, which has led the person claiming the estoppel into a position in which the truth will injure him. There is no such case here."[3]

523. A third essential element in the creation of a binding estoppel is that the statement or representation must be voluntary, unconditional and authorised. A representation procured by fraud, duress or error will nullify any plea of estoppel.[4] That the representation must be unconditional is supported by the advisory opinion of the Permanent Court in the *European Commission of the Danube* case, where the Court refused to uphold a plea of estoppel based on the conduct of delegates of France, Great Britain and Italy in agreeing, during the course of negotiations, that enforcement of regulations of the Commission could be left to the Roumanian authorities. The agreement of the delegates was made dependent upon conditions which were not accepted by the Roumanian Government. The Permanent

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[1] Bernhardt (ed.),7 *Encyclopedia of International Law* (1984), p. 79.

[2] *PCIJ Reports*, Series A, Nos. 20/21 (1929), p. 39.

[3] 18 *American Journal of International Law* (1924), p. 156.

[4] Salvador Commercial Company case, United States Foreign Relations (1902), p. 867.

Court refused to regard this conditional representation as creating a binding estoppel.[1] That the representation must be made by a person having authority to do so is confirmed by the treatment of the Ihlen declaration in the *Eastern Greenland* case.[2] That unilateral declarations or statements made by Government Ministers having ostensible authority to make them will be regarded as binding upon the Government concerned is further confirmed by the judgments of the present Court in the *Nuclear Tests* case (Australia v France),[3] and in the *Case concerning Military and Para-Military Activities in and against Nicaragua* (Merits)[4]; and by the judgment of the Chamber of the Court in the case concerning the *Frontier Dispute* (Burkina Faso/Mali)[5].

524. Further indications of the requirements of a true estoppel, and of the relationship between estoppel and acquiesence, are to be found in some of the more recent case-law of the present Court. The first case to be considered is the case concerning the *Arbitral Award made by the King of Spain on 23 December, 1906* (Nicaragua/Honduras)[6], which has been characterised as illustrating "the narrow distinctions between acquiescence, preclusion, estoppel, and recourse to the subsequent conduct of the parties as a means of interpretation of a treaty."[7] In that case, Nicaragua advanced a number of reasons why the 1906 arbitral award was invalid, including the argument that the designation of the King of Spain as arbitrator in the frontier dispute with Honduras under the terms of the Gomez-Bonilla Treaty of 7 October, 1894, was null and void *ab initio*, the Treaty having lapsed before the King of Spain had signified acceptance of the office of arbitrator. As a matter of treaty interpretation, the Court found that the intention of the parties to the 1894 Treaty had been that, contrary to the contentions of Nicaragua, the ten-year period for which the Treaty was to remain in force should begin to run from the date of the exchange of ratifications. The Court however also gave a broader reason for its conclusion

> "Finally, the Court considers that, having regard to the fact that the designation of the King of Spain was freely agreed to by Nicaragua, that no objection was taken by Nicaragua to the jurisdiction of the King of Spain as arbitrator either on the ground of irregularity in his designation as arbitrator or on the ground that the Gomez-Bonilla Treaty had lapsed even before the King of Spain had signified his acceptance of the office of arbitrator, and that Nicaragua fully participated in the proceedings before the King, *it is no longer open to Nicaragua to rely on either of these contentions as furnishing a around for the nullity of the Award." (Emphasis supplied.)*[8]

Thus, the Court does not appear to have regarded the conduct of Nicaragua as having created a binding estoppel *stricto sensu*, but rather as having created circumstances disentitling Nicaragua from contending that the appointment was invalid and out of time, on grounds of acquiescence or preclusion. No mention was made of estoppel in the judgment of the Court, though the *ad hoc* judge appointed by Nicaragua (Urrutia Holguin) discussed the possibility of estoppel in his dissenting opinion, only to reject it on the grounds that there had been no reliance by Honduras on the conduct of Nicaragua in this respect.[1]

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[1] *PCIJ Reports*, Series B, No. 14 (1927), p. 35.

[2] *PCIJ Reports*, Series A/B, No. 53, pp. 69, 71.

[3] *ICJ Reports 1974*, p. 253, at pp. 267-71.

[4] *ICJ Reports 1986*, p. 14, at p. 132.

[5] *ICJ Reports 1986*, p. 554, at pp. 573-574.

[6] *ICJ Reports 1960*, p. 189.

[7] Hugh Thirlway, "The Law and Procedure of the International Court of Justice, 1960-1989", 60 *British Year Book of International Law* (1989), p. 30.

[8] *ICJ Reports 1960*, p. 208.

525. Nicaragua had also relied on other arguments in an endeavour to demonstrate that the 1906 award, even if not null and void *ab initio* by reason of the irregularity in the designation of the King of Spain as arbitrator, was invalid or incapable of execution. The Court's finding on this aspect of the case was that Nicaragua:

> "... by express declaration and by conduct, recognised the Award as valid and it is no longer open to Nicaragua to go back upon that recognition and to challenge the validity of the Award. Nicaragua's failure to raise any question with regard to the validity of the Award for several years after the full terms of the Award had become known to it further confirms the conclusion at which the Court has arrived."[2]

Here, the finding again appears to be one of a broader notion of preclusion (distinct from estoppel as such), based upon recognition by Nicaragua of the validity of the Award by express declaration and by conduct, and subsidiarily, upon acquiescence evidenced by the lapse of a period of "several years" before Nicaragua raised any question so as to deny the validity of the Award.

526. The judgment of the Court in the *Temple* case displays similar characteristics. Here the question was whether Siam (as it then was) was bound by a map, printed and published by a French firm and handed over officially to Siam, which showed the frontier between Siam and Cambodia as leaving the Temple of Preah Vihear to Cambodia. A treaty of 1904 between Siam and France (as protecting power of Cambodia) had declared the frontier between Siam and Cambodia as following the watershed between two specified river-basins, and it was later established that the line of the watershed ran the other side of the temple so that, if the mapped frontier-line had followed the watershed as contemplated by the 1904 treaty, the temple would have been left to Thailand (as Siam later became). The Court found that the circumstances of delivery of the maps to Thailand in 1908:

> "... were such as called for some reaction, within a reasonable period, on the part of the Siamese authorities, if they wished to disagree with the map or had any serious question to raise in regard to it. They did not do so, either then or for many years, and thereby must be held to have acquiesced."[3]

But the Court did not rely solely on this lack of reaction by the Siamese authorities. It was able to point to *positive* acts of acquiescence and recognition by the Siamese authorities. As Cahier[4] has pointed out, the Court also took into consideration the fact that the Siamese Minister of the Interior had thanked France for the delivery of the maps and had asked for additional copies; the fact that, some years later, the Siamese geographical service had itself published a map showing the temple to be in Cambodian territory; and the fact that the President of the Royal Institute of Thailand had made an official visit to the temple in 1930 where he had been welcomed by the French authorities with all the honours due to his rank. Such a welcome was, in the view of the Court, evidently incompatible with Thailand's sovereignty over the temple. It is accordingly not surprising that this combination of initial inaction followed by lack of protest over many years, coupled with positive acts capable of being construed as active acquiescence, should have led the Court to conclude that Thailand was precluded from challenging the frontier as depicted on the 1908 map:

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[1] *ICJ Reports 1960*, p. 236.

[2] *Ibid.*, pp. 213-214.

[3] *ICJ Reports 1962*, p. 23.

[4] Philippe Cahier, "Le comportement des états comme source de droits et d'obligations", *En Hommage à Paul Guggenheim* (1968), pp. 248-249.

> "Even if there were any doubt as to Siam's acceptance of the map in 1908, and hence of the frontier indicated thereon, the Court would consider, in the light of the subsequent course of events, that Thailand is now precluded by her conduct from asserting that she did not accept it. She has, for fifty years, enjoyed such benefits as the Treaty of 1904 conferred on her, if only the benefit of a stable frontier. France, and through her Cambodia, relied on Thailand's acceptance of the map ... It is not now open to Thailand, while continuing to claim and enjoy the benefits of the settlement, to deny that she was even a consenting party to it."[1]

527. Dominicé, in commenting on the *Temple* case, suggests that it is difficult to draw definite conclusions from this passage. He points out that the Court had already determined that Thailand had accepted the 1908 map before affirming, subsidiarily, that Thailand was now precluded from denying that acceptance. He also wonders in what terms the Court would have expressed itself if it had declared that there was no need for it to determine if the map had been accepted, this fact being presumed by reason of the representations given by Thailand.[2]

528. A more recent commentator has also expressed doubts about whether the circumstances in the *Temple* case were such as to be creative of a true estoppel binding upon Thailand. Referring to the same passage in the Court's judgment, the author comments:

> "It is submitted that there is here some departure from the requirements of an estoppel, at least on a strict interpretation of those requirements. The benefit to Thailand is not material; what is required is a change in the relative positions of the parties, as on a seesaw, whereby the one profits from the other's detriment. France, and Cambodia, equally with Thailand enjoyed the benefit of the 1904 treaty. Furthermore, the benefit which would be relevant is not the benefit *of the treaty*, which Thailand would have had in any event, but the separate benefit *of the representation* that Thailand accepted the map."[3] *(Emphasis in original.)*

529. In the *North Sea Continental Shelf* cases, Denmark and the Netherlands argued that the equidistance rule for the delimitation of the continental shelf employed in Article 6 of the 1958 Geneva Convention on the Continental Shelf had become binding on the Federal Republic of Germany as a result of her subsequent conduct. After noting the details of the subsequent conduct relied upon and stating that the Federal Republic had not become bound by the Convention as such, the Court concluded:

> "Having regard to these considerations of principle, it appears to the Court that only the existence of a situation of estoppel could suffice to lend substance to this contention, - that is to say if the Federal Republic were now precluded from denying the applicability of the conventional regime, by reason of past conduct, declarations etc., which not only clearly and consistently evinced acceptance of that regime, but also had caused Denmark or the Netherlands, in reliance on such conduct, detrimentally to change position or suffer some prejudice. Of this there is no evidence whatever in the present case."[4]

Here the Court is clearly making reference to the essential elements of estoppel in the strict sense, and finding that there is no evidence to sustain such a plea.

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[1] *ICJ Reports 1962*, p. 32.

[2] Christian Dominicé, "A propos le principe de l'estoppel en droit des gens", *En Hommage à Paul Guggenheim* (1968), p. 357.

[3] Thirlway, *loc. cit.* at para 524, footnote 7 above.

[4] *ICJ Reports 1969*, p. 26.

530. In the *Gulf of Maine* case, the Chamber of the Court was confronted with a series of arguments based on pleas of estoppel or acquiescence. In the first place, Canada argued that, as the United States was aware that Canada had issued seabed exploration permits over disputed areas of the Georges Bank and had neither protested nor evinced any reaction, the United States conduct conveyed the clear (if false) impression that the United States accepted the Canadian claims, thereby estopping the United States from later challenging these claims. The Chamber rejected this Canadian argument:

> "... while it may be conceded that the United States showed a certain imprudence in maintaining silence after Canada had issued the first permits for exploration on Georges Bank, any attempt to attribute to such silence, a brief silence at that, legal consequences taking the form of an estoppel, seems to be going too far."[1]

Canada also maintained that the United States had acquiesced in the idea of adopting a median line as the maritime boundary by reason of the conduct of United States officials, particularly evidenced by the "Hoffman letter". Mr Hoffman, an official of the Bureau of Land Management of the (United States) Department of the Interior, in enquiring about the position of certain Canadian concessions, had explained in his letter that he had no authority to commit the United States as to the position of a median line. In rejecting the Canadian plea of estoppel based upon the "Hoffman letter", the Chamber pointed out that Mr Hoffman, like his Canadian counterpart, was acting within the limits of his technical responsibilities, and that Canada could not rely upon the contents of that letter "as though it were an official declaration of the United States Government on that country's international maritime boundaries."[2]

531. In the *Gulf of Maine* case, the Chamber also made an important general pronouncement concerning the relationship between estoppel and acquiescence:

> "The Chamber observes that in any case the concepts of acquiescence and estoppel, irrespective of the status accorded to them by international law, both follow from the fundamental principle of good faith and equity. They are, however, based on different legal reasoning, since acquiescence is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent, while estoppel is linked to the idea of preclusion. According to one view, preclusion is in fact the procedural aspect and estoppel the substantive aspect of the same principle."[3]

532. It is also worthy of note that, in the *Gulf of Maine* case, the Chamber conducted a review of the case-law invoked by Canada in support of its pleas of estoppel or acquiescence. Canada had relied *inter alia* on the judgment of the Court in the *Norwegian Fisheries* case where the Court had found that the Norwegian authorities had applied their system of delimitation by means of straight base-lines consistently and uninterruptedly from 1869 until the time when the dispute arose, and that general toleration of that Norwegian practice was an unchallenged fact. The Court found that such general toleration, combined with other facts (including Great Britain's "prolonged abstention") would in any case warrant Norway's enforcement of her system against the United Kingdom.[4] In the *Gulf of Maine* case, the Chamber considered that the elements of fact and of law in the *Norwegian Fisheries* case and those in the dispute before it were too dissimilar for a comparison to produce legal consequences. The Chamber added:

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[1] *ICJ Reports 1984*, p. 308.

[2] *Ibid.*, pp. 307-308. Cf. the treatment of the Ihlen declaration in the *Eastern Greenland* case and of statements by French Government Ministers in the *Nuclear Tests* cases.

[3] *Ibid.*, p. 305.

[4] *ICJ Reports 1951*, p. 139.

> "Neither the long duration of the Norwegian practice (70 years), nor Norway's activities in manifestation of that practice, warrant the drawing of conclusions from the 1951 Judgment that would be relevant in the present Case."[1]

Canada had also invoked the award in the *Grisbadarna* arbitration (between Sweden and Norway)[2], the judgments of the Court in the *North Sea Continental Shelf* cases, the *Temple* case, and the case of the *Arbitral Award made by the King of Spain on 23 December, 1906*. But the Chamber, in the *Gulf of Maine* case, found that these alleged precedents were distinguishable on the facts. Referring to the case of the *Arbitral Award made by the King of Spain on 23 December, 1906*, the Chamber stated:

> "Acquiescence did play a part in that case, but in reaching that conclusion the Court relied on explicit declarations of Nicaragua, and on conduct that had continued over a very long period, something which does not apply in the present case."[3]

533. In the *Frontier Dispute (Burkina Faso/Mali)* case, the argument was advanced by Burkina Faso that Mali had acquiesced in certain principles of delimitation approved by the Legal Sub-Commission of the OAU Mediation Commission during an earlier, but abortive, attempt to resolve the dispute. Burkina Faso relied on the principle that a State cannot disclaim in a particular instance rules and principles to which it has acquiesced in comparable circumstances, when their operation becomes disadvantageous to itself.

534. The Chamber of the Court, in rejecting this argument, recalled that it was on the basis of international law that it would have to fix the frontier line, weighing for that purpose the legal force of the respective evidence submitted by the Parties for its appraisal:

> "It is therefore of little significance whether Mali adopted a particular approach, either in the course of negotiations on frontier questions, or with respect to the conclusions of the Legal Sub-Commission of the OAU Mediation Commission, and whether that approach may or may not be construed to reflect a specific position, or indeed to signify acquiescence, towards the principles and rules, including those which determine the respective weight of the various kinds of evidence applicable to the dispute. If these principles and rules are applicable as elements of law in the present case, they remain so whatever Mali's attitude. If the reverse is true, the Chamber could only take account of them if the two Parties had requested it to do so...."[4]

535. The legal effect of silence was again at issue in the *Elettronica Sicula* (ELSI) case where the United States argued that Italy was estopped from advancing the plea that the United States application was inadmissible by reason of the failure of the United States companies to exhaust their local remedies in the Italian courts. The United States argument was based on the consideration that Italy had failed to raise the argument of nonexhaustion of local remedies in diplomatic exchanges with the United States prior to the submission of the dispute to the Court, thereby tacitly accepting the United States view that local remedies *had* been exhausted. In rejecting the United States plea of estoppel, the Chamber of the Court stated that:

> "... although it cannot be excluded that an estoppel could in certain circumstances arise from a silence when something ought to have been said, there are obvious

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[1] *ICJ Reports 1984*, p. 309.

[2] *Reports of International Arbitral Awards*, Vol. XI, pp. 161-162.

[3] *ICJ Reports 1984*, p. 310.

[4] *ICJ Reports 1986*, p. 575 (para. 42).

> difficulties in constructing an estoppel from a mere failure to mention a matter at a particular point in somewhat desultory diplomatic exchanges."[1]

536. The time element will also be very important in the consideration of arguments based upon acquiescence. In the *Temple* case, the Court referred to Siam's lack of reaction to the maps delivered in 1908 either "within a reasonable period" or indeed "for many years".[2] In the case of the *Arbitral Award made by the King of Spain on 23 December, 1906*, the Court relied in part upon Nicaragua's failure to raise any question with regard to the validity of the Award "for several years".[3] By way of contrast, in determining, in the *Gulf of Maine* case, that the United States silence with respect to the issuance of Canadian exploration permits over disputed areas of the Georges Bank was insufficient to create an estoppel, the Chamber referred to the silence as "a brief silence at that"[4] and later contrasted it with the "conduct that had continued over a very long period" in the *Arbitral Award made by the King of Spain* case.[5] Thus, the time element in any particular set of circumstances may well be determinative of whether acquiescence can or should be presumed.

537. It is submitted that the foregoing survey demonstrates that international tribunals in general, and the Permanent Court and the present Court in particular, view with considerable caution arguments based on alleged estoppel or on acquiescence having the effect of preclusion. It is of course only natural that States engaged in international litigation will raise arguments based upon the plea of asserted estoppel or acquiescence amounting to preclusion, if only for the reason that the facts supporting such a plea may have some evidential value, as demonstrating inconsistency of conduct, even if the plea as such is rejected. It is however striking that, in the case-law of the present Court, at least over the past thirty years, arguments based upon an asserted estoppel or upon acquiescence amounting to preclusion have in most cases been rejected by the Court. As the survey has demonstrated, this was so in the *North Sea Continental Shelf* cases (although it is fair to add that Denmark and the Netherlands did not advance a plea of estoppel as such), in the *Gulf of Maine* case, in the case concerning the *Frontier Dispute (Burkina Faso/Mali)*, in the *Elettronica Sicula* case, and in the recent judgment of the Court on Nicaragua's application to intervene in the *Land, Island and Maritime Frontier* case between El Salvador and Honduras. Even the earlier case-law of the Court and its predecessor (and indeed of arbitral tribunals) displays the same caution. Thus, the Danish argument in the *Eastern Greenland* case that Norway ws precluded from contesting Danish sovereignty over Greenland by reason of the Ihlen declaration was rejected by the Permanent Court, arguments based on estoppel were dismissed by the Permanent Court in the *Serbian Loans* case, and in its advisory opinion in the *European Commission of the Danube* case, and were likewise dismissed by the sole arbitrator in the Tinoco arbitration. The present Court may have relied to some extent on United Kingdom absence of protest against the Norwegian straight base-line system in the Norwegian Fisheries case, but, as the Chamber noted in the *Gulf of Maine* case, the Norwegian practice had been applied for 70 years and there had been activities by Norway in manifestation of that practice.[6]

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[1] *ICJ Reports 1989*, p. 44.

[2] See text to para 526, footnote 3 above.

[3] See text to para 525, footnote 2 above.

[4] See text to para 530, footnote 1 above.

[5] See text to para 532, footnote 3 above.

[6] See text to para 532, footnote 1 above.

538. Finland does not of course deny that the principles of estoppel and acquiescence have a place in international law, particularly in relation to territorial disputes. As Brownlie rightly points out:

> "Recognition, acquiescence, admissions constituting a part of the evidence of sovereignty, and estoppel form an inter-related subject-matter, and it is far from easy to establish the points of distinction."[1]

Brownlie likewise concedes that "in appropriate conditions acquiescence will have the effect of estoppel", citing the *Temple* case for this conclusion. But he warns that the principle of estoppel "has no particular coherence in international law, its incidence and effects not being uniform"[2] and that it "must be used with caution, more particularly in dealing with therritorial issues".[3] Brownlie urges similar caution in assessing the significance of acquiescence amounting to preclusion:

> "Acquiescence of the kind which closes the principal issue (which therefore has an effect similar to estoppel) must rest on very cogent evidence"[4]

539. It is believed that the foregoing survey of the jurisprudence of the present court and of its predecessor, together with the instances of international arbitral awards reviewed, supports Brownlie's conclusions. It is really only in the *Temple* case and the case of the *Arbitral Award made by the King of Spain on 23 December, 1906* that we see judicial application of the principles of estoppel and acquiesence. The *Temple* case can be characterised as involving both an initial acquiesence (in relation to the 1908 map) and a subsequent estoppel (based on Thailand's later conduct)[5]. The *Arbitral Award of the King of Spain* case is more difficult to characterise. The judgment carefully refrains from using any of the terms estoppel, preclusion or acquiesence. The finding in respect of the alleged irregularity of the King of Spain's appointment looks to be based on acquiesence[6], and the finding in respect of Nicaragua's broader arguments of invalidity looks to be based upon recognition by Nicaragua of the validity of the Award by express declaration and by conduct, buttressed by evidence of acquiesence[7].

Section II. Application of the Law to the Facts

540. At this point, it is necessary to revert to the facts of the present case. It is Finland's *silence* (and on that alone) in relation to the Great Belt bridge project on which Denmark must rely in order to sustain any plea of estoppel or acquiesence.

541. In the first place, it is necessary to look carefully at the terms of the Danish Circular Note of 12 May, 1977.[8] That Circular Note conveyed to all foreign dipolomatic missions accredited to Denmark information about construction plans for the erection of a bridge for

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[1] Ian Brownlie, *Principles of Public International Law*, 4th edn. (1990), p. 161.

[2] *Ibid.*, p. 641.

[3] *Ibid.*, p. 161.

[4] *Ibid.*, p. 161-162.

[5] See text to para 562, footnote 3 above and para 526, footnote 1 above. In the same sense, see Thirlway, *loc. cit.*, at para 524, footnote 7 above, p. 46.

[6] See text to para 524, footnote 8 above.

[7] See text to para 525, footnote 3 above.

[8] Annex 22.

road and rail traffic across the Great Belt, the Danish Parliament having endorsed erection of such a bridge by virtue of Act No. 414 of 13 June, 1973. The Circular Note stated that the planned Great Belt bridge would feature a high level bridge across the eastern channe and a low level bridge across the western channel. It continued:

> "The construction of the section across the eastern channel will, in conformity with International Law, allow international shipping between the Kattegat and the Baltic to proceed as in the past"

The Circular Note also stated:

> "According to all available data the high level bridge across the eastern channel will not in any way restrict passage through the Great Belt by existing ships which have navigated these waters in the past ..."

This was however followed by further information about horizontal clearance of the two sea lanes and by the (ominous) statement that "... the free vertical clearance for passage under the bridge will be 62m. above mean sea level."

542. Despite the two assurances about unrestricted passage given in this Circular Note, it might have been more prudent if Finland had responded to it in writing, if only to draw attention to the possible inconsistency between the proposed vertical clearance for passage under the bridge and the assurances given in the Note itself. But Finland had reasonable grounds for assuming that (a) the bridge project then under consideration was unlikely to be pursued as a matter of urgency, given the degree of internal opposition to it within Denmark and the fact that many previous proposals for a bridge across the Great Belt had come to nothing and (b) Denmark would in any event, if the then bridge project were to be pursued as a matter of urgency, give full effect to the solemn assurances given in the Circular Note. As regards (a), reference is made to Chapter V, Part II of the present Memorial where a detailed account is given of the various Danish plans to modify the navigational conditions in the Great Belt. It will be seen that plans had already been formulated as early as the 1930s for the construction of a bridge across the Great Belt. It will be recalled that the Little Belt bridge (with a clearance of only 33 metres) had been opened on 15 May, 1935. Brüel, in his seminal work on international straits, has commented as follows:

> "Bridges and embankments must the (sic) so constructed that practically all ships can pass under, respectively through them without such difficulties in manoeuvring, that the strait ceases to be a navigable waterway."[1]

To this statement of general principle, Brüel adds the following footnote:

> "This was not observed in the building of the Little Belt Bridge since it was given a height of only 33 metres over the surface of the sea which prevented not merely large warships (although as we are here dealing with merchant ships this is immaterial) but also large merchant vessels e.g. motor vessels engaged in overseas trade from passing through the Belt at all."[2]

Brüel continues:

> "In this connection it may further be asked whether the treaty[3] presupposes that *all three* straits shall be available as passages or whether, irrespective of the treaty, Denmark cannot by means of a bridge or an embankment or in some other way close one or even two of them, so long as one is left open. If this view is taken -in spite

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[1] Erik Brüel, ***International Straits*** (1947), Vol. II, p. 43.

[2] *Ibid.*, footnote 3.

[3] That is to say, the Treaty of Copenhagen.

> of the fact that it may present a certain interest to have several ways to choose from then the strait which is left open must at all events be passable *by all* ships i.e. only the Great Belt could be considered as fulfilling this condition since the construction of the Little Belt bridge."[1] *(Emphasis in original.)*

Brüel comments elsewhere that detailed plans for a bridge over the Great Belt had been prepared as early as 1934; and that a scheme for bridges over both the Great Belt and the Sound had been drawn up by a group of Danish and Swedish engineers in the mid-1930s and published in 1936.[2] It remains only to add that Brüel, in another passage commenting on the construction of the Little Belt Bridge in 1935, expresses the following view:

> "On the other hand, Denmark can now - if she bars the Sound - no more close the Great Belt which formerly had been passable by all vessels."[3]

Thus, there is clear evidence that plans for the construction of bridges over the Great Belt and, indeed, the Sound were under consideration in the mid-1930s, no doubt as a consequence of the construction of the Little Belt bridge; and that a very eminent Danish international lawyer (Brüel) had drawn attention to the limitations imposed by the Treaty of Copenhagen on the building of a bridge or embankment across the Great Belt which, after the construction of the Little Belt bridge, was and remained the only viable passage-way from the Baltic to the North Sea (and *vice versa*) for large deep-draught vessels. Accordingly, the bridge project of 1977 was only the latest in a series of such projects which had been planned since the mid-1930s. The Court will recall in this context that a Governmental Commission was established in Denmark in 1948 to study the possibility of constructing a bridge over the Great Belt, the Commission reporting in 1960. Again, this led to no immediate action beyond the setting up of yet another investigation.[4] In all the circumstances and in the light of the long history of abortive plans to construct a bridge over the Great Belt, it is hardly surprising that Finland should not have reacted immediately to the Danish Circular Note of 12 May, 1977.

543. As regards (b), Finland also took into account the two solemn assurances given by Denmark in this Circular Note about passage through the Great Belt. Finland was surely entitled to rely on these assurances, fortified as they were by the public views already expressed by two very eminent Danish international lawyers. Attention has already been directed to the views expressed by Brüel; the evidence of Sørensen's views, as expressed in his 1957 evidence to the Danish Great Belt Commission and in his published statement of 29 January, 1962, can be found in Annex 19 to this Memorial. The Circular Note of 12 May, 1977, did not go into any detail on the technical specifications of the proposed bridge, beyond indicating the planned horizontal and vertical clearances. But even a bridge with a vertical clearance of only 62 metres would not necessarily have caused problems for Finland if the more detailed plans for the bridge had taken sufficient account of the requirement, referred to in the second of the two Danish assurances, not to "... restrict passage through the Great Belt by existing ships which have navigated these waters in the past ...", such ships including the drill ships, submersibles and jack-ups manufactured in Finnish shipyards.

544. Finland's silence and lack of response to the Danish Circular Note of 12 May, 1977, must also be assessed in the light of the time-frame within which a reaction might have been

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[1] Erik Brüel, *International Straits* (1947), Vol II, pp. 43-44.

[2] *Ibid.*, p. 15, footnote 3.

[3] *Ibid.*, pp. 111-112.

[4] Danish Written Observations of 28 June 1991, paras. 11 and 12.

called for. Denmark concedes, in its Written Observations of 28 June, 1991, that the then Danish Prime Minister announced to the Danish Parliament on 3 October, 1978, that, due to financial considerations, the Government had decided to postpone the implementation of the Great Belt project.[1] It seems that the decision to suspend the project had already been taken no later then 30 August, 1978, when the Danish Prime Minister informed the public that an agreement had been reached between the Social Democrats and Venstre to suspend the project *sine die*. Denmark denies that the project was suspended "sine die" and points to the fact that the Danish Minister for Public Works had stated on 17 October, 1978, that the project was not abandoned but merely postponed for an anticipated period of four to five years.[2] However one interprets the terms in which the project was finally suspended in 1978, there is no doubt that it was put "into the refrigerator" for an indefinite period, even if it was expected or anticipated on the Danish side that work on it might be resumed within a measurable period. Accordingly, as from 30 August, 1978, at the latest, the then Great Belt project, to which reference was made in the Danish Circular Note of 12 May, 1977, was effectively suspended for an undefined period. It follows that any immediate threat to Finnish rights and interests was (at least temporarily) removed as from the summer of 1978, so that no reaction from Finland to the Danish Circular Note of 12 May, 1977, was or could have been called for as from the date of the announcement of the suspension. Finland's silence on the Danish Circular Note of 12 May, 1977, understandable in the light of the considerations to which reference has already been made, was therefore a "brief silence" (to use the phrase adopted by the Chamber of the Court in its judgment in the *Gulf of Maine* case).

545. It is of course natural that Denmark should have sought to concentrate attention on the Danish Circular Note of 12 May, 1977, notwithstanding that the bridge project under consideration in that year was effectively suspended just over a year after the issuance of the Note. It is natural if only because Denmark seeks thereby to establish *continuity* between the 1977 Great Belt project and the subsequent 1987 Great Belt project. But in fact there was no such continuity. This is confirmed by the fact that the Danish Government felt obliged to send out to foreign missions accredited to Denmark a second Circular Note on 30 June, 1987. The first two paragraphs of the 1987 Circular Note are instructive as demonstrating the lack of continuity between the 1977 project and the 1987 project:

> "The Ministry of Foreign Affairs has the honour to inform that on 26 May 1987 the Danish Folketing (Parliament) passed a new Act No. 380 of 10 June 1987 on the construction of a fixed traffic connection for both vehicular and rail traffic across the Great Belt i.e. between Halsskov on Zealand and Knudshoved on Funen.
>
> The new Act repeals the former Act No. 414 of 13 June 1983 (sic) on the construction of a bridge across the Great Belt, of which all Heads of Mission were informed by Circular Note of 12 May, 1977."

546. Thus, the first object of the 1987 Circular Note was to inform foreign missions of the passage of this new Act, which was to provide the statutory basis for the *new* project, and of the repeal of Act No. 414 of 13 June, 1973, which provided the statutory basis for the 1977 Great Belt project.

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[1] Danish Written Observations of 28 June 1991, para 14.

[2] Mr Magid's statement of 2 July 1991, during the oral hearings on Finland's request for an indication of provisional measures. But cf. para 15 of the Danish Written Observations of 28 June 1991, where the Minister is recorded as having simply stated that "the Government *expected* that the necessary preconditions for resuming the Project would not be present until 4-5 years had passed": emphasis supplied. An *expectation* falls somewhat short of an *anticipation*. See also Chapter V, Part II above (paras 130-133).

547. The 1987 Circular Note goes on to demonstrate the significant differences between the 1977 Great Belt project and the *new* project of which notice was being given in 1987. The new project was to be tackled in two stages. The first stage was to be a railway connection, by means of a tunnel under the eastern channel of the Great Belt and of a low level bridge across the western channel. The second stage was to be a motorway connection which was to cross the western channel on the same low level bridge as the railway connection. The contrast with the 1977 Great Belt project is significant, since the 1977 project envisaged the railway connection across the eastern channel as proceeding by means of the same high level bridge as would carry the motorway connection. But even more significant is the following statement included in the 1987 Circular Note:

> "It has not yet been decided whether the motorway shall cross the eastern channel on a high level bridge or a tunnel."

This is immediately followed by a further solemn assurance:

> "In case the bridge solution is selected, the erection of the bridge section crossing the eastern channel will, in conformity with international law, allow for the maintenance of free passage for international shipping between the Kattegat and the Baltic Sea as in the past."

548. It is necessary to interpolate here that between the years 1977 and 1987 no less than 13 Finnish drill ships and oil rigs of various types had passed through the Great Belt.

549. Denmark raised no objection to the passage of these drill ships and oil rigs, this passage being effected in accordance with the two assurances given by Denmark in its Circular Note of 12 May, 1977. Moreover, it cannot be objected that Denmark was unaware of the continuing passage through the Great Belt of drill ships and oil rigs manufactured in Finland and the Soviet Union during this period.

550. That the passage of these drill ships and oil rigs (produced not only in Finland but also in the Soviet Union) had been noted by the Danish authorities is confirmed by the statement made by Mr Magid on 5 July during the course of the oral hearings on Finland's request for an indication of provisional measures. Mr Magid, in response to a question posed by Judge Shahabuddeen, referred to the fact that the official comments to the 1987 Bill, prepared by the Danish Ministry of Public Works, had asserted that:

> "A high level bridge shall probably have a navigational clearance of 76-77 metres."

In commenting on this assertion, Mr Magid stated:

> "The Ministry based its estimate upon information from the Ministry of Industry and the Danish Maritime Authority, which had in 1986 noted that drill ships produced in the Soviet Union and Finland had a height above water level ranging between 60 and 75 metres and that a bridge clearance of 76 metres was therefore called for."[1]

Subsequently, the Danish Government reduced the bridge clearance to 65 metres, notwithstanding the information available to the Danish Ministry of Industry and the Danish Maritime Authority about the continuing passage through the Great Belt of drillships produced in the Soviet Union and Finland having a height well above 65 metres.

551. The main point to note about the Circular Note of 30 June, 1987, however, is that it clearly indicated that no final decision had yet been made as to whether the road connection over the eastern channel should be by way of a high-level bridge or by way of a tunnel. Even if it were to be by way of a high level bridge, no indication was given in the

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[1] 2 July 1991.

Circular Note of what the vertical clearance would be. Again, Finland and other foreign States were in any event reassured that if the bridge solution were to be selected, the erection of the bridge section crossing the eastern channel will "in conformity with international law, allow for the maintenance of free passage for international shipping between the Kattegat and The Baltic Sea as in the past", the "past" for this purpose including the year 1986 when the Danish authorities had, as Denmark itself admits, noted the passage through the Great Belt of drill ships produced in the Soviet Union and Finland and having a height considerably in excess of 65 metres.

552. It is amply clear from the foregoing analysis of the 1987 Circular Note that Finland cannot be held to have acquiesced, as a result of her failure to respond to that Circular Note, in the construction of a high level bridge over the eastern channel of the Great Belt having a vertical clearance of 65 metres, the effect of which would be to deny free passage through the Great Belt of drill ships and oil rigs manufactured in Finland. A tunnel for road traffic would not have had that effect, and the option of a tunnel solution had been left open. Moreover, even a bridge solution would not necessarily have had that effect if, in drawing up plans for the bridge, Denmark had given full effect to the assurance given to foreign missions in the 1987 Circular Note.

553. Indeed, it was not until receipt of the third Danish Circular Note of 24 October 1989, that Finland and other States were put formally on notice of the firm Danish decision to construct a high-level bridge over the eastern channel of the Great Belt with a vertical clearance of 65 metres above sea level. By that time, Finland had already expressed its concern to Denmark, as a result of the letter from the Finnish Embassy in Copenhagen to the Danish Board of Navigation of 18 July, 1989 (Annex 60 to the present Memorial). As soon as it became clear from the reply of the Danish Ministry of Foreign Affairs of 29 August, 1989 (Annex 61 to the present Memorial) that the planned Great Belt bridge would indeed obstruct passage through the Great Belt of drill ships and oil rigs manufactured in Finland, Finland endeavoured to engage Denmark in negotiations with a view to finding a solution.

554. Quite apart from the fact that the Danish Circular Note of 30 June, 1987, did not call for any immediate reaction from Finland because the option of a tunnel solution for the road traffic connection across the eastern channel of the Great Belt had been deliberately left open and because a renewed assurance of free passage for international shipping *as in the past* had been given, the time element is also important. In this context, the silence of Denmark is, if anything, even more significant than the silence of Finland. During the oral hearings on Finland's request for an indication of provisional measures, it was admitted on behalf of Denmark that the Danish Minister of Transport had already decided, in November 1988, that only a high-level road bridge should be put out for tender.[1] Why were foreign missions not immediately notified formally of this decision? The Circular Note of 30 June, 1987, had clearly put foreign missions on notice that both options - a high level bridge and a tunnel - were still open as regards the road traffic connection across the eastern channel of the Great Belt. Yet it was not until 24 October, 1989 - almost a year after Denmark had decided in principle in favour of a high-level bridge - that foreign missions were informed not only that a firm decision had been taken within Denmark in favour of the high-level bridge solution but that the plan was for a high-level bridge with a vertical clearance of only 65 metres. One of the essential elements of any plea of acquiescence is that the State alleged to have acquiesced acted or failed to act in full knowledge of the circumstances. Thus, Article 45 of the Vienna Convention on the Law of Treaties, 1969 (which deals with acquiescence in the context of the law of treaties), provides:

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[1] Statement by the agent of Denmark, Mr. Magid, on 2 July 1991.

> "A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under Articles 46 to 50 or Articles 60 and 62 if, *after becoming aware of the facts*:
>
> (a) it shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or
>
> (b) it may by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be." *(Emphasis supplied.)*

It will be noted that the phrase "after becoming aware of the facts" governs both limbs of the rule so enunciated. In the present case, and applying by analogy the principle of acquiescence as formulated in the context of the law of treaties, it is apparent that limb (a) is wholly inapplicable (because Finland has never expressly agreed that Denmark is entitled to build a high-level bridge over the Great Belt which would prevent the free passage of drill ships and oil rigs manufactured in Finland), and that limb (b) is equally inapplicable (because Finland did not become aware of the firm Danish proposal to construct a high-level bridge over the Great Belt with a vertical clearance of 65 metres until the summer of 1989 at the earliest, and immediately ventilated its concern). It should also be noted that the International Law Commission, in its commentary to what later became Article 45 of the Vienna Convention on the Law of Treaties, laid particular stress on the need for the State alleged to have acquiesced in the loss of a right to invoke a ground of invalidity, termination etc., to have been aware of the facts. The Commission considers:

> ".... that the application of the rule in any given case would necessarily turn upon the facts and that the governing consideration would be that of good faith. This being so, the principle would not operate if the State in question had not been aware of the facts giving rise to the right or had not been in a position freely to exercise its right to invoke the nullity of the treaty." [1]

If one applies the principle of good faith to the circumstances of the present case, the suspicion cannot wholly be dismissed that Denmark, for internal political or indeed for other reasons, had determined already in 1987 that the motorway connection across the eastern channel of the Great Belt should be by means of a high-level bridge rather than a tunnel; and that the Circular Note of 30 January, 1987, was carefully formulated to reduce to a minimum the possibility that foreign States might object to such a solution. It is in any event quite clear that foreign missions accredited to Denmark were not formally made aware of the full extent of the Danish plans for a fixed link for road traffic across the eastern channel of the Great Belt until 24 October, 1989. Accordingly, any Danish argument of acquiescence based upon the lack of an immediate reaction from Finland to the Danish Circular Note of 30 June, 1987, is manifestly unfounded.

555. Finland would in any event question whether Denmark is entitled to rely on tacit consent in the form of acquiescence as a basis for unilateral action by way of derogation from the generally recognised right of free passage for international shipping through straits. Finland is aware that tacit consent does play a role in international law, notably in connection with the rule governing the acceptance of reservations to multilateral conventions. But the rationale here is that all States parties to the multilateral convention in question or entitled to become parties will have been made aware of the reservation formulated by the reserving State, and will have been given an opportunity to object to the reservation and even *in extremis* to attach to such objection the consequence of a denial of treaty relations with the

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[1] *Report of the International Law Commission* (1966): *GAOR*, 21st Session, Supplement No. 9 (A/6309/Rev.l), p. 69 (para (5) of commentary to Art. 42).

reserving State. Furthermore, it is clear that any reservation which is incompatible with the object and purpose of the convention is impermissible. There are accordingly certain safeguards for States confronted with a reservation to a multilateral convention which they consider to be either impermissible or inimical to their interests. The situation is however quite different in the context of proposed unilateral action by a State to construct a traffic link across an international strait which would obstruct free passage through that strait for a particular category or categories of international shipping which have previously enjoyed such free passage. Indeed, Finland would submit that, in such circumstances, what is needed is the express agreement of the user States, that is to say, the States which have traditionally, and as of right, utilised the strait for the free passage of vessels constructed in their shipyards. Finland notes that this was the position taken by the United Kingdom and France in the context of their early consideration of proposals to construct a fixed link across the Dover Strait in the English Channel. In a Joint Report of British and French officials submitted to their respective Ministers of Transport in 1963, reference is made to the juridical problems inherent in the proposal to construct a bridge across the Dover Strait for road and rail use, following a straight route 21 miles long. Referring to this bridge project, the Joint Report states:

> "The bridge offers a continuous road and rail Channel link in the open, which makes it an attractive proposal to road users; but it would undoubtedly be a new and serious hazard and source of delay to mercantile and naval shipping in the Strait of Dover, which is one of the busiest shipping channels in the world, with traffic of the order of 500 ships a day; moreover *it could not be constructed without international agreement both to the bridge in principle* and to the additional measures necessary for the safe regulation of sea traffic;" [1] *(emphasis supplied).*

The same point is repeated later in the Joint Report:

> "Besides the serious disadvantage to shipping which it would involve, the bridge project could not be carried out, having regard to the principles of international law, until Great Britain and France *had sought the concurrence of the States principally concerned with navigation in the Channel.* An agreement of this kind, which could in particular be concerned with the drawing up of a system for the regulation of navigation, would certainly involve lengthy negotiations which would only with difficulty be brought to a conclusion." [2] *(Emphasis supplied.)*

In a later chapter of the Joint Report devoted to "Practicability", the juridical aspects of the bridge project are analysed in the following terms :

> "A bridge would interfere with the use of recognised sea lanes and, before beginning its construction, it would be necessary for Britain and France *to seek the prior approval of the States principally concerned with navigation in the Channel.* It would not suffice merely to notify and to light and mark obstructions. If any associated system for the regulation of navigation were to be complied with, this also would require international agreement in advance. International agreement on a matter of such complexity could only be achieved after prolonged and difficult negotiation." [3] *(Emphasis supplied.)*

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[1] *Proposals for a Fixed Channel Link* (Joint Report by British and French Officials presented to British and French Ministers of Transport in July 1963): Cmnd. 2137 (Annex 58 to this Memorial). The citation is from para. 1.8.

[2] *Ibid.*, para. 1.9.

[3] *Ibid.*, para. 3.17.

Thus, it will be seen that, when consideration was first given in the 1960s to the construction of a fixed Channel link, both the British and French Governments considered it necessary to obtain the "concurrence" or the "prior approval", of the States principally concerned with navigation in the Channel if a bridge solution were to be pursued. That concurrence or prior approval would have to take the form of an international agreement which would be difficult to negotiate. It is of some interest that the plan for a bridge connection under consideration within the framework of the 1963 Joint Report envisaged, for the 10 spans crossing recognised navigation channels a clearance height above high water of 230 feet (70 metres).[1]

556. The Court will be aware that plans for a fixed Channel link were postponed following consideration of the 1963 Joint Report, and that the matter was not taken up again by the two Governments until 1981 when a further joint study by experts was commissioned. This resulted in the submission, in June, 1982, of a further Report of a UK/French Study Group analysing the various alternatives for a fixed link across the Channel for rail or road traffic. This second Report is not as specific as the 1963 Joint Report about the need to obtain the concurrence of user States in the form of an international agreement before work could begin on a bridge project. Nevertheless, it does reiterate the need for international consultation in the context of proposals for bridges, immersed tubes or combined projects:

> "All the road projects require fixed structures to be placed in the sea, e.g. bridge piers, ventilation shafts etc. These structures must be protected against accidental collisions with ships even if they are located outside the shipping lanes. In this respect, although proposals for new, compact and economic devices have been sketched out, the only type of protection which can be considered at present consists of artificial islands. The dimensions of these islands would have to be substantial - a 40-60 m. platform around the structure and low gradient slopes (one in three to one in five), all protected from erosion.
>
> From the point of view of the hazard to shipping, the spacing of these obstacles and the flexibility of their siting varies according to the option chosen, but no project completely avoids them being located in a main shipping lane. Therefore, for all these options, measures must be taken to maintain the freedom and safety of shipping during surveying, construction work and (with regard to the final structure) the operating phase.
>
> It would of course be the responsibility of France and the United Kingdom to draw up these provisions, but other countries should be consulted through the appropriate international authorities to demonstrate that the rights of transit passage will be respected and shipping safety maintained." [2]

The problems associated with bridges, immersed tubes and other composite options are summarised in the second Report as follows:-

> "For bridges, immersed tubes and the composite options, provisions for maintaining the safety and freedom of shipping must be drawn up and approved by the international organizations once study of the project is sufficiently advanced. There is no guarantee that the outcome of such negotiations would be favourable."[3]

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[1] *Proposals for a Fixed Channel Link* (Joint Report by British and French Officials presented to British and French Ministers of Transport in July 1963): Cmnd. 2137 (Annex 58 to this Memorial) at para 1.3.

[2] *Fixed Channel Link Report of UK/French Study Group* (June 1982) : Comnd. 8561 (Annex 83 to this Memorial). The citation is from paragraphs 4.12 and 4.13.

[3] *Ibid.*, para. 4.25.

557. Finland is of course aware that no direct comparison can be made between the proposal for a high-level road bridge across the English Channel and the proposal for a high-level road bridge across the eastern channel of the Great Belt. Finland is equally aware that the eventual decision of the French and British Governments for a fixed Channel link was to construct a bored railway tunnel, which raised none of the difficulties identified in the 1963 and 1982 Reports of securing the concurrence or agreement of the States principally concerned with navigation in the Channel and through the Dover Strait. What is, however, of relevance in the present context is the recognition by both the French and British Governments of the need to secure the *active* consent of the user States to any project (such as a bridge project) which would have a significant impact upon the safety and freedom of shipping in and through the Dover Strait.

558. Finland has so far concentrated on demonstrating that, as a State party to the present case before the Court, she is neither estopped from challenging the compatibility with international law of the current Danish project for establishing a fixed traffic link across the eastern channel of the Great Belt, nor has she acquiesced in that project, so far as it involves the construction of a high-level bridge with a clearance of 65 metres. But it will be apparent to the Court that the substantive issue which the Court has to decide in the present case, namely, the *scope* of the right of passage through an international strait, is a matter of concern to all maritime States - indeed to the international community as a whole. Finland does not of course take the extreme position that no State is entitled to construct a bridge across an international strait; but it does take the position that the State wishing to construct a high-level bridge over an international strait with a clearance height which would deny passage to ships, including drill ships and oil rigs manufactured in other States, must consult with, and obtain the positive agreement of, such States, particularly where no alternative mode of passage through the strait is available or is to be made available for ships so denied passage.

559. Finland would summarise its position on any argument that might be advanced by Denmark alleging that Finland is estopped from challenging the compatibility with international law of the current Danish project for the construction of a highlevel bridge over the eastern channel of the Great Belt with a clearance height of 65 metres, or has otherwise acquiesced in that project, in the form of the following submissions:

1) None of the conditions identified by international case-law as being requisite for an estoppel exist in the present case. In particular, there has been no representation or statement by or on behalf of Finland evincing clearly acceptance of any Danish proposal to construct a high-level bridge over the Great Belt which would interfere with or obstruct the right of free passage through the Great Belt currently enjoyed by merchant vessels and other ships manufactured in Finland, including drill-ships and oil rigs so manufactured. Finland relies in this context on the essential elements of estoppel identified by the Chamber of the Court in its recent judgment of 13 September, 1990 on Nicaragua's application to intervene in the case concerning the ***Land, Island and Maritime Frontier Dispute*** between El Salvador and Honduras, by the Court itself in the *North Sea Continental Shelf* cases, and by the Chambers of the Court in the *Gulf of Maine* and *Elettronica Sicula* cases. Finland equally relies on the award of the sole arbitrator in the *Tinoco* arbitration, and on the decisions of the Permanent Court in the *Eastern Greenland* and *Serbian Loans* cases.
2) On the facts of the present case, there has been no such acquiescence by Finland as could warrant the Court in treating the failure of Finland to respond to the Danish Circular Notes of 1977 and 1987 as precluding Finland from pursuing her Application to the Court and seeking the relief therein sought. In particular, as regards the Circular Note of 1977, it is clear that the bridge project then under construction was postponed in the

summer of 1978 for an undefined period, so that the time element required by international caselaw to sustain a plea of acquiescence is not met. As regards the Circular Note of 1987, it is equally clear that it was not so worded as to call for a reaction from Finland in defence of Finnish rights and interests. In this context, Finland relies *inter alia* (so far as the time element is concerned) on the judgments of the Court in the *Norwegian Fisheries* case, in the case of the *Arbital Award made by the King of Spain on 23 December, 1906* and in the *Temple* case, and on the judgments of Chambers of the Court in the *Gulf of Maine* case and the *Elettronica Sicula* case.

3) As the plea of acquiescence rests upon considerations of good faith and equity, it is necessary to take into account the conduct of *both* parties to the dispute. In this context, Finland submits that the failure of Denmark, prior to the issuance of the third Danish Circular Note of 24 October, 1989, to notify foreign missions of Denmark's decision (already taken in November, 1988) to opt for a high-level bridge rather than a tunnel to carry road traffic over the eastern channel of the Great Belt must be taken as disentitling Denmark from advancing a plea of acquiescence as against Finland in respect of the 1987 Circular Note.

4) Denmark cannot properly rely upon tacit consent evidenced by acquiescence (the conditions for which are not in any event met in the present case) in relation to a project which would interfere with and, in some instances, physically obstruct the right of free passage through the Great Belt of categories of ships which have hitherto enjoyed or exercised that right.

PART IV

SUBMISSIONS

560. Having regard to the considerations of fact and of law developed in this Memorial, Finland repeats the submissions it made in its Application of 17 May 1991 and asks the Court to adjudge and declare:

(a) That there is a right of free passage through the Great Belt which applies to all ships entering and leaving Finnish ports and shipyards;

(b) That this right extends to drill ships, oil rigs, other special ships and reasonably foreseeable ships;

(c) That the construction of a fixed link over the Great Belt as currently planned by Denmark would be incompatible with the right of passage mentioned in subparagraphs (a) and (b) above;

(d) That Denmark and Finland should start negotiations in good faith, on how the right of free passage, as set out in subparagraphs (a) to (c) above, shall be guaranteed.

20 December 1991

Tom Grönberg

Agent of the Government
of Finland

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COUNTER-MEMORIAL OF DENMARK

CONTRE-MÉMOIRE DU DANEMARK

VOLUME I

INTRODUCTION

1. The present Counter-Memorial is submitted in pursuance of the Court's Order dated 29 July 1991, fixing *inter alia* the time limit of 1 June 1992 for the submission by the Kingdom of Denmark of its written pleading in the present case.

2. Following the principle, according to which the Parties should endeavour to address those issues which continue to divide them, the Government of Denmark wishes at the outset to express its concurrence with the Finnish point of view expressed in the Memorial (para. 7, p. 5) that there is no dispute as to the jurisdiction of the Court in the present case.

3. Nor do the Parties appear to be divided with regard to the fact that the Danish straits are international straits governed by a long history, certain specific treaty provisions and customary rules of international law resulting in a right of innocent passage through these straits. In this sense the actual dispute is narrowed down to the question of determining the exact scope of this *right of innocent passage* seen in relation to the *sovereign rights of the Kingdom of Denmark*, the territory of which is separated *inter alia* by the stretch of territorial sea named the Great Belt.

4. Within these parameters the dispute may further be narrowed down to a conflict between a right of *innocent passage* and the sovereign right of Denmark to *build a bridge* across the Great Belt thereby uniting the main parts of the realm of the Kingdom of Denmark. The dispute may also be seen as a conflict concerning the scope of the *principle* of innocent passage and the concrete *application* of that principle in accordance with Danish sovereign rights. Even on this point it is worth noticing that the right of Denmark to build a bridge across the Great Belt is *not* contested by Finland, (para. 8, pp. 5 - 6 of the Memorial). It is the *design* of the bridge which must not deprive the strait of its character as navigable waterway.

5. Finland argues as if the bridge *deprives* the Great Belt of its navigable character, whereas the fact is that the high-level bridge across the Eastern Channel has been carefully designed with such horizontal and vertical clearances that it *leaves the waterway open* to the continued traffic of all existing ships navigating the Great Belt as will be demonstrated in Chapter IV and VIII of Part I.

6. Furthermore Finland submits in its Application *that* there is a right of free passage through the Great Belt which applies to all ships entering and leaving Finnish ports and shipyards; *that* this right extends to drill ships, oil rigs and reasonably foreseeable ships; and *that* the construction of a fixed bridge over the Great Belt as planned by Denmark would be incompatible with such a right of passage.

7. In the Memorial (para. 560) these submissions are repeated, but with an addition implying that the Finnish claim is now extended to include also "other special ships". The Memorial fails to draw the attention to this addition by simply stating that "Finland repeats the submissions it made in its Application". This tendency on the part of Finland of widening the subject matter from drilling platforms - originally mentioned in the Finnish letter of 18 July 1989 addressed to the Danish Maritime Authority (Annex 60) - to reasonably foreseeable ships and now to other special ships has marked the Finnish presentation all along.

8. The Introduction to the Memorial, read together with the final submissions, confirms what Denmark observed in the oral proceedings concerning the Request for the Indication of Provisional Measures, namely, that the Finnish contention is that its right of passage through the Danish territorial sea is a right presenting three extraordinary characteristics, being at the same time an absolute, an unlimited, and an expanding or elastic right.

9. The right of passage as claimed by Finland is *absolute*, because it disregards completely the sovereign right of Denmark over its own territorial sea, which is part of its "submerged

territory", and also ignores Denmark's legitimate right to connect the two geographically divided segments of its territory and its population. Finland forgets that the function of the Court in this dispute is the fundamental one of all tribunals, namely, to ensure, in a concrete case, the compatibility of conflicting rights, none of which may pretend to be absolute, even with some sacrifice by both parties. Yet, in the Introduction to its Memorial (paragraph 17) Finland asserts that "the Court is not called upon to establish an *ad hoc* balance but to apply the law". However, the function of law is not to grant to an obstinate claimant the "pound of flesh" it believes itself to be entitled to, but to seek a proper balance between the conflicting interests and the competing rights of the disputing States.

10. The right of passage claimed by Finland is *unlimited*, because it is not satisfied with a vertical clearance of 65, or 70, or 80 metres, nor even by a clearance of 180 metres, because new designs of offshore craft may create the need for a higher vertical clearance. In its submissions it asks the Court (para. 560) to declare that it has a right of passage through the Danish straits, without proposing or accepting any definite height limit for a reasonable vertical clearance.

11. Finally the claims of Finland amounts to an *expanding or elastic* right because it asks the Court to declare that such an absolute and unlimited right is capable of expanding and increasing in height as a result of future developments in marine design and construction. In the Introduction to the Memorial it refers to the need "to take into account foreseeable trends in ship design and size" (para. 5, p. 5).

12. This look into the future permeates the whole Memorial. Thus, Finland refers in a number of paragraphs to new trends in future ship building and marine construction. For example, it is stated that "a height of 65 metres will be able to accommodate most but not all existing ships" (para. 4, p. 5 of the Memorial). Yet, it contends that Denmark is prevented from erecting the projected

bridge, in order to permit the occasional passage of offshore craft such as drill ships, oil rigs and other special ships "*under construction or design* whose dimensions vastly exceed the height of 65 metres", see paragraph 5, page 5 of the Memorial (Italics added). As will be demonstrated the Fixed Link across the Great Belt will not prevent a single ship from entering or leaving the Baltic Sea.

13. The Danish experts have mentioned the possibility of raising the vertical clearance by 3.8 metres, but this did not satisfy the Finnish experts who observed that "(t)his would not solve the basic problem ... there is no reason to believe that the height of future ships would remain less than 75 metres" (Annex 72 to the Memorial, p. 242).

14. To accept a right of passage with such characteristics - taking into account also that a movable bridge must be excluded *inter alia* due to the increased risk of collision with the bridge - means imposing a perpetual and increasing servitude *non edificandi* upon the Kingdom of Denmark. As the late Professor Max Sørensen has once observed, "... there is also general agreement that it is not possible, and therefore not necessary, to take into account unknown developments of the future. Once the bridge is there, future ship constructions will have to be adapted to it. A certain principle of priorities can be adopted for this purpose. ..." (para. 597).

15. The Counter-Memorial will show the intensive considerations given by successive Danish Governments to the bridge project seen in relation to the passage through the Great Belt. Denmark has indeed paid heed to the prudent advice of Dr. Erik Brüel in his treatise *International Straits*, (London 1947), where he writes in the concluding section:

> "... the history of both Turkey and Denmark shows what risks are run by the strait state when it shows too great a disregard for its "social" functions. It is then impossible to say more than that in administering international straits the coastal state

> must bear in mind that it is carrying out a communal function as well as looking after its own interests. ..." (Vol. II. p. 426).

16. In its administration of the straits Denmark is seeking an equitable balance between its sovereign rights and the interests of the international community.

17. Considering the fact that the existing traffic of ships through the Great Belt is left unaffected by the bridge across the Eastern Channel of the Belt, the dispute boils down to a confrontation between the alleged right of passage of Finnish mobile offshore drilling units (MODUs) and Denmark's sovereign right to unite the two main parts of its territory by constructing *inter alia* a high-level bridge. This dispute is narrowed down even further by the fact that almost all Finnish MODUs may without modifications pass through the Danish strait named the Sound as it will be demonstrated in Chapter VI of Part I. The few existing Finnish units (already built and delivered) which may not pass through either the Sound or the Great Belt may nevertheless be able to do so subject to temporary modifications of the rigs. The actual confrontation may then be limited to the hypothetical passage in the *future* of certain oil drilling structures with exceptional dimensions and the bridge. This represents a striking factual contrast of the present case. Moreover, these floating offshore objects do not come within an internationally recognized concept of ships and are, therefore, not entitled, as a matter of legal right to unimpeded passage through the Danish straits.

18. The dispute is characterized by another surprising fact i.e., no direct provision of international law exists which governs the question of the building of bridges across international straits, though international straits for centuries have been the subject of much political and legal controversy. This is especially true with regard to the Danish and the Turkish straits where positive treaty regulations have been adopted with a view to regulating the traffic of ships through these straits, which are otherwise subject to national sovereignty.

19. The history of the Danish straits as outlined in paragraphs 554 - 560 confirms this point of view in the sense that Danish sovereignty over its straits is not to be contested. Even though certain Danish rights in this respect may have been abolished in the course of history, such as the payment of passage dues, the basic sovereignty of Denmark was left untouched. The right of innocent passage through the Danish straits is another restriction imposed upon Danish sovereignty in the interest of the international community at large. Such restrictions on the sovereignty of a State are themselves subject to a restrictive interpretation. No absolute and permanent servitude can be imposed upon a sovereign State through such a restriction.

20. A further characteristic feature of the present case concerns the fact - as already mentioned - that Finland accepts the building of a bridge across the Great Belt as justified under international law as long as the bridge provides for an opening with a width of about 200 metres and no limitation as to the height within that width. However, such a bridge would traditionally be constructed as a low-level bridge, and the result seen in relation to the considerable traffic through the Great Belt would be to hamper the passage in such a manner that the strait would cease to be a navigable waterway - a result that would run counter to the applicable rules of international law governing the passage through the Danish straits. It is exactly these international rules which Denmark has sought to fulfil by constructing the bridge with a height of 65 metres and a main span of 1,624 metres so as to leave open the waterway for the existing traffic of ships - a course of action which at the relevant time met with no objection from any State.

21. In this connection it should be noted that Finland presents the case as if Denmark is about to *plan* a high-level bridge across the Great Belt, whereas the fact is that the high-level bridge as part of the whole integrated project for a fixed traffic link across the Great Belt was made law in 1973. Preparatory design work was initiated in the same year, culminating in a notification to all

foreign missions accredited to Denmark in May 1977 giving details of the construction of the bridge. No objections were raised by Finland.

22. The project was suspended at the end of the 1970s, but resumed in the early 1980s and again notified in 1987. Finland's first diplomatic reaction to the bridge project was conveyed to the Government of Denmark on 19 June 1990 - more than *twelve years* after the bridge project was notified in written diplomatic form to the international community. The operative time for a relevant objection must be when the project is initiated, not when it is about to be completed. It is the submission of the Government of Denmark that Finland did not raise a timely protest with the strait State, thereby placing the Danish society in an impossible position. In this connection it should be borne in mind that the Fixed Link across the Great Belt is *one integrated project* meaning that the development of the construction plans on each separate part is part and parcel of the Project as a whole.

23. Bearing in mind that each case must be decided on its own merits, a reasonable approach for deciding the present dispute would appear to start out from the facts *that* the bridge project across the Great Belt traverses *in toto* Danish territorial waters; *that* these waters are subjected to passage by ships in accordance with long standing treaty provisions and national Danish regulations amounting to a right of innocent passage through the Danish straits for ships of all nations based both on conventional and customary law; *that* this right is administered by Denmark as the strait State and as *negotiorum gestor* of the international community; *that* objections to the Danish administration must be raised directly with the Government of Denmark in a way and within a time frame which leaves the strait State a realistic possibility of changing its administrative practice, if necessary; *that* the high-level bridge across the Great Belt has been designed in such a way as to leave open the passageway for existing ships which is explained by the fact that the yearly movements of about 20,000 ships through the Great Belt will *not* be affected by the bridge, whereas the Finnish

transport of drill ships, oil rigs and other offshore constructions which hitherto have passed through the Danish straits, at an average rate of 1 unit a year since 1974, may have to use the Sound as a passageway and in certain cases temporarily to modify the rigs to enable them to be transported through the Great Belt or the Sound; *that* this sequence of facts together with the element of *proportionality* which permeates central aspects of the present case explains why no state objected to the bridge project when launched in 1973 and notified to all foreign missions in Copenhagen in 1977, thus leaving the Kingdom of Denmark to proceed with the realization of the Project, in good faith.

24. Taking account of the particular circumstances of the present case and its history it is the submission of the Government of Denmark that the rules of international law applicable to the Danish straits do not prevent Denmark from building the bridge across the Eastern Channel of the Great Belt as an integrated part of the Great Belt Project currently under construction.

25. The Government of Denmark reserves its position with regard to all points of facts and law advanced by Finland in its Memorial which have not been addressed in this Counter-Memorial.

PART I

THE FACTS

CHAPTER I.

THE GEOGRAPHY OF DENMARK AND THE DANISH STRAITS

26. Denmark lies south of the Scandinavian Peninsula and north of the European Continent proper, and between the North Sea and the Baltic Sea. Besides *Jylland* (the Jutland Peninsula), Denmark is made up of numerous smaller and bigger islands. Whereas the land frontier (with Germany) is only 67.7 kilometres, the total coastline exceeds 7,300 kilometres. Apart from the many smaller islands, Denmark consists of the Jutland Peninsula and the two major islands, *Fyn* (Funen) and *Sjælland* (Zealand). Almost half of the five million Danes live on Zealand and its main neighbouring islands, *Lolland*, *Falster*, and *Møn*, these being interconnected by bridges with Zealand. The other half of the population lives on Jutland and Funen which are also connected by bridges. Reference is made to Map I that shows the geography of Denmark with the Danish straits, *Lillebælt* (the Little Belt), *Storebælt* (the Great Belt), and *Sundet* (the Sound), as exits and entrances to the Baltic Sea. These straits form a system of navigational routes between the North Sea and the Baltic Sea. The Map also shows that *Femer Bælt* lies between the Danish island of *Lolland* and the German island of *Fehmarn*[1].

27. The Little Belt is the narrow strait that separates on the one side the Jutland Peninsula and the island of *Als* from on the other side the islands of Funen and *Ærø*. Its length is 70 nautical miles, and its width varies between 0.4 - 16 nautical miles. At its deepest it is 81 metres, and its minimum depth in the navigable channel is 15 metres. Due to its narrow and winding character, the presence of shoals, and its rather strong currents the Little Belt is

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[1] The geographical position of *Femer Bælt* is incorrectly described in para. 5, p. 11 of the Memorial as lying between the island of *Fehmarn* and the German North Coast. The breadth of 3 nautical miles of the territorial seas of both Denmark and Germany leaves a route of open sea in the *Femer Bælt*.

difficult to navigate. Since 1935 Jutland and Funen have been linked by a bridge across the Little Belt. In 1970 a second bridge across the Little Belt was opened.

28. The Great Belt is the stretch of water between the islands of *Samsø*, Funen, and *Langeland* on the one side and Zealand and *Lolland* on the other. It has a length of about 90 nautical miles. The width of the Great Belt varies from 5.7 to 15 nautical miles. Between *Knudshoved* on the Funen side and *Halsskov* on the Zealand side, the Great Belt is divided by the island of *Sprogø* into two passages of almost equal width, the Western Channel and the Eastern Channel. The navigable route in the Western Channel between *Knudshoved* and *Sprogø* is about 2 nautical miles wide, in the Eastern Channel between *Sprogø* and *Halsskov* the navigable route is about 1 nautical mile wide.

29. The bottom topography of the Great Belt is dominated by irregular trenches. In the central part of the Great Belt - to the south west and south of *Halsskov* - the depths of the trenches may be up to 60 metres; in the northern part of the Belt up to 60 metres and in the southern part of the Belt up to 40 metres. The water depth in the trenches varies typically between 30 and 40 metres. However, to the north of the island of *Sprogø* there is an area of shallow water. The water depth in this area is about 26 metres.

30. The Sound is the strait between Denmark (the island of Zealand) and Sweden. Its length is approximately 56 nautical miles, its width varies between 2.2 to 27 nautical miles. The capabilities of the Sound as a navigable route to and from the Baltic Sea is dealt with in Chapter VI. This Chapter also describes the project for a fixed link across the Sound between Copenhagen and the Swedish town of *Malmö*, see paragraphs 355 - 364.

31. The currents in the Danish straits are caused by the rivers flowing into the Baltic Sea and the meteorological conditions over Northern Europe. The relatively high river run off to the Baltic Sea results in out-flowing surface currents in the Danish straits.

However, these out-flowing surface currents are masked by the irregular currents which are driven by the variable wind conditions over the Baltic and the North Sea. The speed of the currents in the central part of the Great Belt and the Sound varies normally between ½ and 3 knots.

32. Map II shows that the Little Belt is Danish internal waters, and that a substantial part of the Great Belt is Danish territorial sea. The area of the construction of the Fixed Link across the Great Belt is shown on Map III. This area is in its entirety within the Danish territorial sea. The Sound between Denmark and Sweden is partly Danish, partly Swedish territorial sea, with part of the main navigational route traversing Danish internal waters.

CHAPTER II.

THE DANISH PLANS FOR A FIXED LINK ACROSS THE GREAT BELT

A. The Early Plans

1. INTRODUCTION

33. The Great Belt divides Denmark's population in almost equal halves. For more than half a century there has been an urgent desire to unify the country by establishing a fixed traffic link across the Great Belt. The implementation of such a project would have significant advantages for the Danish society. In proportion to the size of the Danish society considerable investments would be needed for the carrying out of the Project. The Project could be carried out in different ways. The issue of a fixed link across the Great Belt has, therefore, over the years been subject of extensive debate in the Danish Parliament and in the media.

2. THE PROPOSALS MADE IN THE 1930s

34. In the 1930s major bridge projects were successfully carried out in Denmark. In 1935 the first bridge across the Little Belt connecting Jutland and Funen was opened, and in 1937 the 3.2 kilometres long bridge across the *Storstrøm* connecting Zealand and *Falster* was completed.

35. Due to the advances in engineering technology and the increase in private car ownership a fixed connection across the Great Belt no longer seemed an impossibility, and in 1934 a Danish railway engineer published a project for a narrow combined road- and single track rail bridge across the Great Belt.

36. In March 1936 three major Danish engineering firms published a thoroughly elaborated project for a bridge across the

Great Belt as a part of a major motorway network linking all of Denmark together. The bridge combined a two-track rail line and a roadway for motor traffic.

37. The project elicited major public and political interest and led the Government to consider the construction of a bridge across the Great Belt. In a letter of 23 May 1936 the Ministry of Foreign Affairs advised the Ministry of Public Works that the clearance for a bridge across the Great Belt allowing the highest existing ships to pass would conform to international law (Annex 1).

38. The project published by the three major Danish engineering firms prompted the Danish State Railway to make the first official project for a bridge across the Great Belt[2]. In the budget for the Danish State Railways funds were set aside for soil investigations in the Great Belt. However, before the investigations could be initiated, the outbreak of World War Two caused the Project to be suspended.

B. The Preparatory Work 1948 - 1972

1. THE GREAT BELT BRIDGE COMMISSION

39. Shortly after the end of World War Two renewed interest in the bridge project emerged. For three weeks during the exceptionally cold winter of 1947 only the most powerful Danish icebreaking vessel could cross the Great Belt, and an emergency airlift between Zealand and Funen was established. This caused the Government in 1948 to establish a Commission to consider the effect of a bridge for rail and road traffic across the Great Belt.

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[2] Figure 1 shows the design of the high-level bridge across the Eastern Channel made by the Danish State Railways and published in 1936.

40. In 1956 the Commission issued a preliminary report on the technical aspects of establishing a fixed link across the Great Belt[3]. The Report contained the Commission's preliminary findings as to the alignment of the bridge and the design of the bridge.

41. The Commission's final Report was completed in December 1959 and published in 1960[4]. The Commission recommended an alignment from *Halsskov Rev* over the island of *Sprogø* to *Knudshoved* to be examined more thoroughly. The technical design of the bridge was a continuation of the bridge Project made in the late 1930s by the Danish State Railway[5].

42. The Commission had obtained an opinion from the Danish Ministry of Foreign Affairs on the foreign policy considerations which had to be taken into account in connection with the plans to erect a bridge across the Great Belt. In a letter of 12 February 1957 from the Ministry of Foreign Affairs to the Ministry of Public Works it was stated that under international law nothing would prevent the construction of a bridge across the Great Belt provided that the bridge was constructed in such a way that it did not present any hindrance to the passage of even the largest vessels existing at the time. The said letter refers to an opinion rendered on 4 February 1957 by the legal adviser on international law to the Ministry of Foreign Affairs, Professor Max Sørensen (Annex 2).

43. On this basis, the Commission recommended a vertical clearance of around 67 metres to give all existing vessels free passage. The Commission rejected the idea of a low-level bridge with movable parts (bascule, swing or hoist bays). The Commission found that considerations relating to the navigation and the intense traffic over the bridge would exclude such a solution (Annex 3).

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[3] Report 155/1956.

[4] Report 237/1960.

[5] Figure 1 shows the design of a high-level bridge across the Eastern Channel made by the Great Belt Bridge Commission and published in 1960.

44. The Commission regarded it as technically possible to construct a bridge across the Great Belt and stated that the burden placed on society by carrying out the Project was not likely to exceed the economic capacity of the country. The Commission did not propose a time for the start of construction of a bridge across the Great Belt, as this *inter alia* had to be adapted to the prevailing economic policy, the employment situation and the possibilities for obtaining financing. Furthermore, the construction had to conform to a long-term programme for the total public investment activities. Within the society's investment activities the major traffic investments had to be placed in a specified order of priorities (Annex 4).

45. In 1961 a Traffic Economic Committee established in 1955 by the Minister for Public Works issued a report on the priorities of the major traffic investments in an aggregated 20 year programme for public traffic investments[6]. The Traffic Economic Committee recommended that a decision on implementing the necessary preliminary investigations concerning the Great Belt Bridge ought to be made early so that the bridge could be completed before 1975.

2. THE 1961 ACT

46. Following the final Report by the Great Belt Bridge Commission and the Report by the Traffic Economic Committee, the Minister for Public Works submitted a Bill on 8 November 1961 on Technical Preparatory Works for the Construction of a Combined Road and Railway Bridge across the Great Belt (Annex 5). The proposals made by the Great Belt Bridge Commission were well received in Parliament, and Parliament unanimously passed the Bill. The Bill was enacted as Act No. 379 of 20 December 1961 authorizing the Minister for Public Works to initiate the planning

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[6] Report 294/1961.

and soil investigations necessary for the construction of a combined road and rail bridge across the Great Belt (Annex 6). The Act also authorized the administration to make the expropriations necessary to carry out the investigations.

3. The Working Committee

47. In accordance with a proposal made by the Great Belt Bridge Commission the Minister for Public Works had in 1960 established a Working Committee *inter alia* with the aim to follow traffical, technical and economic developments of importance for the Fixed Link. In 1962 the Working Committee's tasks were extended to make preliminary technical investigations in connection with the Great Belt Bridge. In 1962 - 63 the Working Committee was responsible for a preliminary soil investigation programme, and in 1963 - 64 for a new traffic analysis.

48. In 1965 the Minister for Public Works announced an international competition for the design of a bridge or tunnel across the Great Belt. An international committee consisting of seven judges of which one was Finnish was established to examine the entries submitted. 144 entries were received from 18 countries including Finland[7].

49. In 1968 the Working Committee submitted its report on a fixed link across the Great Belt[8]. In the Report six alternative bridge, tunnel and combined bridge-tunnel solutions are reviewed.

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[7] In para. 123 of the Memorial, it is stated that "(m)any suggestions contained a combined bridge - tunnel alternative". This can give a wrong impression of the importance of the bridge - tunnel alternatives. In the published excerpt of the Report given by the Committee of Judges it is declared: "The number of submitted tunnel proposals was rather limited. Some of these proposals presuppose methods of implementation which hardly are practically feasible, and a few of the proposals do not satisfy the conditions for the competition. The number of proposals to be considered has therefore been very small".

[8] Report 508/1968.

In the Report it is stated that there seems to be little doubt that the railway connection should be double tracked, and that much seems to speak in favour of establishing or at least preparing a six-lane motorway connection[9].

50. Information on the air draught of vessels which might pass the Great Belt was collected in order to establish the clearance for a bridge across the Eastern Channel. Based on the obtained information the Working Committee stated that there are vessels with such an air draught that a clearance of approximately 68 metres would be necessary[10].

51. In 1960 there had been made a private proposal for a fixed link across the Great Belt consisting of a low-level bridge across the Eastern Channel and a tunnel under the Western Channel. The Western Channel was to be made navigable for the largest ships by a deepening of the area to a depth of 15 metres. This proposal gave rise to a new inquiry to the Ministry of Foreign Affairs. In an opinion of 29 January 1962 Professor Max Sørensen gave an account of the rules of international law on the right of passage in international straits which had been dealt with at the Conference in Geneva 1958 (Annex 7). The opinion was enclosed in the Report submitted in 1968 by the Working Committee. As to the private proposal, Max Sørensen stated that nothing can be said with certainty about the compatibility of the private proposal with Denmark's obligations under international law, but that the question

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[9] In para. 124 of the Memorial, it is stated that "(r)elying heavily on economic considerations, the Working Group suggested the construction of a bridge with a combined two-track railway plus a six-lane motorway, all in one floor." The use of the term "relying heavily on economic considerations" may give a wrong impression of the comprehensive and well balanced work carried out by the Working Committee. It should also be noted that the Working Committee does not point to one single solution as maintained in the Memorial. The Working Committee only points out that a combined road and rail bridge still is to be regarded as the most economic solution.

[10] Figure 1 shows the design for a high-level suspension bridge across the Eastern Channel made by the Working Committee and published in 1968.

is associated with no inconsiderable doubts. With due regard to the importance of the interest at stake, Professor Max Sørensen was not in a position to advise the implementation of a project which raises such doubts, irrespective of the technical or economic advantages offered by the project.

4. THE TECHNICAL COMMITTEE

52. In 1970 the Minister for Public Works appointed a Technical Committee. The Technical Committee was requested to make a feasibility study of the possible types of fixed links across the Great Belt including an examination of a so called car-train solution where the vehicular traffic is transferred on to special shuttle trains. The Technical Committee was later requested to evaluate the possibility of constructing a fixed link via the island of *Samsø*. In the Report submitted by the Committee in 1972 it is stated that the most economic solution would be a fixed link across the Great Belt constructed as a two-track railway tunnel under the Eastern Channel and a low-level rail bridge across the Western Channel for the ordinary railway and the car-train traffic[11].

53. In connection with the work of the Technical Committee, Professor Max Sørensen has rendered an opinion of 8 March 1971 on whether the building of a low-level bridge across the Western Channel in connection with either a tunnel or a high-level bridge with sufficient clearance across the Eastern Channel could be done in accordance with international law (Annex 8). In this opinion Professor Max Sørensen referred to a *Pro Memoria* of 28 August 1968 on questions pertaining to international law in connection with the construction of a fixed link across the Sound. The *Pro Memoria* was edited by Dr. Hans Blix, legal adviser to the Swedish Ministry of Foreign Affairs, and consented to by Professor Max Sørensen. In this *Pro Memoria* it was stated that the passage

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[11] Figure 1 shows the design for a high-level bridge made by the Technical Committee and published in 1972.

should not be precluded or impeded for even the largest presently existing vessels which are able to pass through the Sound irrespective of whether the vessel in question sails in ballast or with cargo. On the other hand, only ships could be taken into account, not other floating constructions, such as drilling platforms, which might pass through the Sound by way of towing.

C. The Initial Project

1. THE 1973 ACT ON THE CONSTRUCTION OF A BRIDGE ACROSS THE GREAT BELT

54. Based on the preparatory work carried out by the Commission[12], the Working Committee[13], and the 1972 Report by the Technical Committee the Minister for Public Works submitted on 16 January 1973 a Bill on the Construction of a Bridge across the Great Belt (Annex 9). It was proposed in Section 2 of the Bill that the Project should consist of a high-level bridge across the Eastern Channel and a low-level bridge across the Western Channel with a six-lane motorway with emergency lanes and two railway tracks. The design of the high-level bridge should allow for the necessary navigational clearance.

55. In Section 5 of the Bill it was proposed that a special, governmental administrative entity, *Statsbroen Store Bælt*, be established by the Minister for Public Works who should be in charge of the Project.

56. The reasons for the choice of a combined road and railway bridge amongst the options provided in the previous reports are given in the comments to the Bill. The Government considered a pure rail tunnel solution technically vulnerable compared to a

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[12] Report 237/1960.

[13] Report 508/1968.

combined rail and road bridge. It was also felt that the motorists would find the car-train solution inferior to a solution enabling the cars to drive across the Great Belt. The car-train solution would then result in less traffic across the Great Belt with an ensuing fall in revenue.

57. The comments to the Bill also addressed the issue of international law. It was underlined that international law necessitated that the bridge across the Eastern Channel be given a clearance sufficient for the passage of the largest existing ships. On the basis of the available information the Ministry of Foreign Affairs and its adviser on international law considered that the Western Channel of the Great Belt must be characterised as a secondary navigational channel, and that Denmark would not be neglecting its obligations under international law in preventing passage through this navigational channel by building a low-level bridge. It is further explained in the Comments to the Bill that since the legal evaluation is based on a Danish view of actual conditions, the Government intends to give foreign countries involved a chance to put forward any objections they may have, once a decision to build the link has been taken.

58. The Bill was well received in the Danish Parliament and was passed with 117 votes against 28, 16 abstentions, and enacted as Act No. 414 of 13 June 1973 on the Construction of a Bridge across the Great Belt (Annex 10).

2. *STATSBROEN STORE BÆLT*

59. In November 1973 the Minister for Public Works appointed the members of the board of *Statsbroen Store Bælt*.

60. The steep increases in energy prices at the end of 1973 and in the beginning of 1974 caused the Government to have *Statsbroen Store Bælt* investigate whether the increase in the prices of energy had changed the preconditions for the 1973 Act. It was to be

investigated whether a rail tunnel only solution was to be preferred, thereby abolishing the motorway connection. The two alternative solutions, a combined rail and road bridge as provided for in the 1973 Act or a rail tunnel only solution, were to be compared with a continuation of the ferry service. The preparatory work to be carried out under the 1973 Act was suspended until the results of these investigations were available. Consequently, the organisation of *Statsbroen Store Bælt* with a permanent staff was also suspended.

61. In August 1975 the Board of *Statsbroen Store Bælt* published the results of the supplementary investigations. The Board concluded that a fixed link across the Great Belt would still be very profitable for the society, and that the car-train solution with a two-track rail tunnel and a low-level bridge was still the most profitable solution.

62. In the account of traffic policy given by the Minister for Public Works to the Danish Parliament on 16 October 1975 the Minister stated that the most important traffic policy issues were the design of the Fixed Link across the Great Belt and the final decision to start the works.

63. In December 1975 two small parties in the Danish Parliament submitted a Bill to amend the 1973 Act in order to have a tunnel instead of a bridge across the Eastern Channel. A third political party proposed a resolution on a suspension of the Great Belt Project. In May 1976 the Bill as well as the proposed resolution was defeated by a substantial majority of votes. The Bill was defeated by 126 votes against 30, 6 abstentions; the resolution to suspend the Project was defeated by 101 votes against, 60 for and 5 abstentions.

64. In June 1976 the position of executive director for *Statsbroen Store Bælt* was advertised, and the first executive director was appointed on 1 September 1976.In January 1977 *Statsbroen Store Bælt* had a permanent staff of six persons.

65. In May 1977 a number of international newspapers and other publications carried advertisements from *Statsbroen Store Bælt* inviting contractors of international standing to prequalify for bidding for the high-level bridge across the Eastern Channel. The invitation contained technical specifications on the bridge including the clearance to be provided (Annex 11). Applications for prequalification were to be submitted not later than by 1 August 1977.

3. The Circular Note of 12 May 1977

66. By Circular Note of 12 May 1977 the Ministry of Foreign Affairs advised all Heads of Foreign Diplomatic Missions accredited to Denmark of the Great Belt Project (Annex 12).

67. The Note advised on the 1973 Act on the Construction of a Bridge across the Great Belt and stated that construction plans were now being prepared. The Note is not, as claimed in paragraph 128 of the Memorial, a generally phrased statement to the effect that the construction across the Eastern Channel in conformity with international law will allow international shipping between the Kattegat and the Baltic to proceed as in the past. The Note contained detailed information on the alignment and the utilization of the bridge. In the Note it was stated that according to available data the high-level bridge across the Eastern Channel would not in any way restrict passage through the Great Belt by existing ships which have navigated these waters in the past. An explanation for the horizontal clearance of the high-level bridge is given, and it is expressly stated that the free vertical clearance for passage under the high-level bridge will be 62 metres above mean sea level.

68. The purpose of the Note was, as explained in the comments to the 1973 Act, to give foreign States the opportunity to object to the Project. The wording of the Note leaves no doubt. Any State receiving the Note which was of the opinion that a bridge across the Eastern Channel with a clearance of 62 metres would not

be in accordance with international law because the bridge would not allow for passage of existing ships through the Danish straits had a strong inducement to object. This seemed to be prudent especially for countries having a coastline within the Baltic. And a country whose shipyards at the time of the receipt of the Note had built seven semi-submersibles with air draughts exceeding 62 metres and had entered into contracts obligating to deliver an additional number of similar semi-submersibles, and who was of the opinion that the planned bridge would violate its rights, had to object not to suffer any loss of rights. No internal political or economic circumstances in Denmark at the time when the Note was sent could justify an omission to object.

69. The Note was sent to all States having diplomatic representation in Denmark at the time including the then six States around the Baltic Sea, Sweden, Finland, the USSR, Poland, the German Democratic Republic and the German Federal Republic. Only two countries reacted in substance to the Note. Less than seven months after the receipt of the Danish Circular Note Poland suggested in a Note of 6 December 1977 that future trends within the shipbuilding should be taken into consideration (Annex 13). Three month later the USSR stated in a Note of 29 March 1978 *inter alia* that the free height below the bridge girder in the Eastern Channel should allow for the passage of ships with an air draught of a minimum 65 metres, and the free horizontal clearance between the bridge piers should be at least 350 metres (Annex 14). From Finland there was silence until the summer of 1989, more than 12 years after the Note was issued.

70. Denmark answered the USSR in a *Note Verbale* of 28 June 1978 (Annex 15). In its answer Denmark points out that all particulars available to Denmark show that the clearance under the bridge will not restrict passage through the Great Belt for ships having navigated these waters in the past. The answer goes on to state that there is no material available to the Danish Authorities which would justify a vertical clearance of 65 metres and asks the Embassy of the USSR to submit information to support the need for

such a clearance as soon as possible. The Danish Ministry of Foreign Affairs did not receive any answer to this request. The Note from Poland was answered by Denmark's *Note Verbale* of 3 July 1978 (Annex 16).

4. The Progress of the Initial Project

71. In the period from October 1976 until August 1978 there was a large planning and research activity in *Statsbroen Store Bælt* and considerable progress was made in the work related to the design of the Great Belt Bridge. In this period the total number of persons employed by *Statsbroen Store Bælt* and its consultants was around 195.

72. In 1977 the alignment, the longitudinal profile and the cross-section of the Great Belt Bridge was determined. A decision on the length of embankments was made. Measurements and tests concerning hydrography, maritime environment, seismology, traffic of ships, meteorology, soil conditions etc. were carried out. Fourteen contracting groups were prequalified for bidding for the high-level bridge across the Eastern Channel[14].

73. In 1978 measurement and test work continued. Meetings were held with the prequalified contractors, and the tender material was prepared in order to be issued in October 1978. The bids were to be received in mid-1979.

74. Also in 1978 invitations to submit tenders for limited preparatory works comprising an embankment from *Halsskov* reef, a temporary harbour and a work site area on Zealand were issued. Offers for this limited work were submitted, and a contract was negotiated with the lowest bidder. Only one contract was negotiated, and in the event the works under the contract had been

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[14] Figure 1 shows the design for the high-level suspension bridge across the Eastern Channel made by *Statsbroen Store Bælt* and published in 1978.

initiated and carried out, it would have accounted for less than two percent of the budget for the high-level bridge and less than one percent of the budget for the total Great Belt Project[15].

75. Early August 1978 Danish newspapers informed that *Statsbroen Store Bælt* had initiated land acquisitions in order to start work on the Bridge Project, and that election of contractors could be expected to take place around 20 August 1978.

5. DEBATES IN THE DANISH PARLIAMENT ON THE GREAT BELT PROJECT 1977 - 1978

76. In an attempt to justify Finland's decision not to respond to Denmark's Circular Note of 12 May 1977 the Government of Finland has put forward two assertions (para. 129 of the Memorial). First, that the Note contained a statement to the effect that international shipping in conformity with international law would be allowed to proceed as in the past. This assertion has been dealt with in paragraphs 67 - 68.

77. The second assertion made by Finland is, that at the time of the dispatch of the Note the political atmosphere in Denmark was very uncertain. Therefore, "(a)s for Finland no reaction was considered necessary". The Government of Finland has been ill advised in making this statement in its Memorial. Finland has not proven that the reason mentioned here was present and decisive for the Finnish Government at the time. In the unlikely event such proof should be presented, it is obvious that the Finnish Government in such case has acted under a misconception for which they themselves must bear responsibility.

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[15] In para. 132 of the Memorial, refers to "contracts that had been negotiated on construction works were left unsigned". In using this language Finland could create the impression that a number of contracts covering a substantial part of the Project had been negotiated and left unsigned. This is not so. The only negotiated contract which was not signed due to the postponement of the Project was the contract mentioned in para. 74 of this Counter-Memorial.

78. In October 1977 two parties from each side of the political spectrum took initiatives concerning the Great Belt Project.

79. A party from the Right (*Fremskridtspartiet*) submitted a Bill proposing that the Great Belt Project be suspended. In the comments to the Bill it is stated that the Fixed Link across the Great Belt should be built as soon as it is economically feasible. From the Left another party (*Socialistisk Folkeparti*) proposed a resolution requesting the Government to submit a Bill postponing the establishment of a bridge across the Great Belt until after 1990. The reasons for this resolution were also of an economic nature. None of the proposals called for an abolition of the Project. Due to the two parties' limited number of seats in the Parliament it was evident from the very beginning that the likelihood of success for these proposals was nil. The proposals were rejected.

80. Finland tries to convey the impression that as early as June 1978 it was almost certain that the Great Belt Project would be suspended, and that despite this, tender procedures were undertaken by *Statsbroen Store Bælt* (para. 131 of the Memorial). The facts do not support Finland's point.

81. Already on 16 March 1978 the Danish Parliament had rejected a proposal to stop the funding of the Great Belt Project with 109 votes against 61.

82. On 1 June 1978 a Motion was introduced in the Danish Parliament by the Liberal Party (*Venstre*). This Motion contained the factual statement that the point in time when it definitively was too late to change the decision on the Great Belt Bridge would not be until the end of August. During the debate on the Motion the Minister for Public Works pointed out that the Motion only contained the facts which the Government had set forth earlier. The Minister for Public Works made it clear that *Statsbroen Store Bælt* would continue its work as planned and added that the Great Belt Project had been discussed and confirmed several times in the Parliament. The Government supported the Motion which was

passed with 114 votes against 14; 24 abstentions. The Motion did not as maintained by Finland contain a decision by the Parliament to reconsider the bridge decision. Even after the Motion was passed a suspension of the Great Belt Project was not to be expected.

83. For Finland to use the Parliamentary Debates in the period after the transmittal of the 1977 Circular Note as an excuse not to react to the Note is absurd. Foreign Governments were obliged to take the formal communications from the Government of Denmark at face value. They were not entitled to disregard them as unrealistic on the basis of their own assessment of internal Danish politics.

D. The Postponement

1. THE DECISION TO POSTPONE THE PROJECT

84. In connection with the formation of a new government an unexpected and atypical coalition between the Social Democratic Party and the Liberal Party, it was decided at the end of August 1978 to postpone the Great Belt Project as a part of a general austerity programme. In his opening address to the Danish Parliament on 3 October 1978 the Prime Minister announced that due to financial considerations the Government had decided to postpone the Great Belt Project. The Prime Minister stated that the Government would give the Danish Parliament a more detailed account of the issue subsequently (Annex 17).

85. This account was given by the Minister for Public Works on 17 October 1978 (Annex 18). The Minister stated that the decision to postpone the Project was made against the background of the very severe economic situation of the country. The Minister stressed that the Great Belt Project was merely postponed and stated that the Government expected that the necessary preconditions for resuming the Project would not be present until 4 - 5 years had passed. The 1973 Act remained in force, and it was decided to use

the postponement period to carry out additional investigations concerning the Project.

86. In order to have the important and far-reaching preparatory work carried out by *Statsbroen Store Bælt* and its consultants available when the Great Belt Project was to be resumed, it was decided that *Statsbroen Store Bælt* and its consultants should continue to finalize the project work concerning the bridge across the Eastern Channel and prepare a comprehensive report on the activities undertaken by the agency in 1977 - 1979[16]. The material concerning the Project prepared by *Statsbroen Store Bælt* was filed and placed in separate archives with a view to being utilized when the Project was resumed.

2. Reactions from other States

87. It was thus clear to everyone that the Great Belt Project was only postponed for a limited period, and that the Project would be carried out in the foreseeable future. Thus, the USSR showed more considerate and careful behaviour than the one Finland has tried to defend in paragraphs 127 - 128 of the Memorial. In a Note of 18 January 1979, referring to the Danish Parliament's decision to postpone the erection of the bridge for a 4 - 5 year period and to use the intervening period to investigate issues relating to a fixed link across the Great Belt, the USSR requested to be kept informed about the more detailed plans for the implementation of the Project in order to have a more detailed knowledge of all related issues (Annex 19). From Finland there was only a continued silence.

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[16] *Statsbroen Store Bælt* in 1979 published the Report: *En redegørelse for de af Statsbroen Store Bælt i medfør af lov nr. 414 af 13. juni 1973 om anlæg af broen over Store Bælt udførte forberedende arbejder 1977 - 79* (Statement concerning preparatory works undertaken from 1977 to 1979 by *Statsbroen Store Bælt* in pursuance of Act No. 414 of 13 June 1973 on Construction of a Bridge across the Great Belt).

3. DEBATES IN THE DANISH PARLIAMENT ON THE GREAT BELT PROJECT 1978 - 1985 AND NEW INVESTIGATIONS

88. After the decision to postpone the Great Belt Bridge Project for a 4 - 5 year period, attempts were made in the Danish Parliament to have the Government obliged to continue the Project without delay. Attempts were also made to have the Project further postponed. None of these attempts led to any change in the decision taken by the Government in 1978. The 1973 Act remained in force and so did the Government's commitment to resume the Project in 1983.

89. In his opening address to Parliament on 5 October 1982 the Prime Minister stated that the Government would give Parliament an account of the future traffic connections between the Eastern and Western part of Denmark. The account would be given on the basis of the results of the research program implemented subsequent to the decision in 1978 to postpone the Great Belt Bridge and in the light of the total economic situation of the country and of the employment situation in the country.

90. On 15 February 1983 the Minister for Public Works gave to Parliament an account of the future traffic connections between the Eastern and Western part of Denmark (Annex 20). The Minister stated *inter alia* that the decision made in 1978 to postpone the Project was made against the background of the general economic situation of the country. The economic situation of the country had not improved in the intervening period. Nevertheless, the Government found that the decision to establish a bridge across the Great Belt should be upheld. The Government found that the developments in tunnel technology could allow a new technical evaluation of the various possibilities for the carrying out of a combined connection for road and rail across the Eastern Channel. It was also to be investigated whether a fixed link could be constructed in stages. It was the Government's intention to give Parliament an account of the Project when these investigations had been carried out, probably in the spring of 1985.

91. On 3 March 1983 the account given by the Minister for Public Works was debated in Parliament. The debate showed a parliamentary majority for supporting a fixed link across the Great Belt, and the Minister received a clear mandate to initiate a technical updating of the 1978 Project[17].

92. After receiving this mandate the Minister for Public Works had in the following two-year period major investigations on technical and economic issues relating to the Fixed Link across the Great Belt carried out.

93. In April 1983 the Minister for Public Works established a Technical Group to update the 1978 Project and to reevaluate alternative proposals for the Project. The Report of the Technical Group was published at the end of 1983. As to the bridge project, the Report relied on main assumptions identical to those applied in the 1978 Project. The vertical clearance of the bridge across the Eastern Channel was identical to the earlier project and also the horizontal clearances were the same, namely either 780 metres for a cable-stayed bridge or 1,416 metres for a suspension bridge[18].

94. In 1985 two reports on a fixed link across the Great Belt were published. The Minister for Public Works had established a working group consisting of three prominent and independent economists. The task of the working group was *inter alia* to investigate the economic consequences of a fixed link. The Report

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[17] A proposal tabled by the Radical Liberal Party (*Det Radikale Venstre*) to annul the 1973 Act was dismissed. Few months later, on 10 May 1983 the Danish Parliament passed a Motion tabled by the Radical Liberal Party calling for an amalgamation of the ferry routes for road and rail traffic across the Great Belt. The Motion was opposed by the Government who found that investments in the ferry services would be made obsolete by the establishment of a fixed link and could only lead to a delay in the construction of a fixed link across the Great Belt. The majority of Parliament decided against the Government, and a Bill on the Expansion of the Ferry Services across the Great Belt was enacted as Act No. 296 of 6 June 1984.

[18] Figure 1 shows the design for a high-level suspension bridge across the Eastern Channel made by the Technical Group and published in 1983.

published by the working group concluded that the so called car-train solution as well as the bridge solution containing a motorway would be economically competitive compared to a continuation of the ferry service. Another working group established in 1983 by the Minister for Public Works with the task to investigate the traffic between the Eastern and Western part of Denmark published also in 1985 a report on the economic consequences of various technical options for a fixed link across the Great Belt. The Report concluded that as in all other investigations undertaken a fixed link across the Great Belt would be a highly profitable investment for the Danish society.

95. Following the technical and economic investigations the Minister Public Works on 17 April 1985 gave the Parliament the promised account of the Fixed Link across the Great Belt (Annex 21). The account concluded that a fixed link across the Great Belt would contribute to a significant improvement of the most important traffic connections, that a fixed link across the Great Belt would be a very profitable investment to the benefit of the Danish society, and that the Government held it of importance to have the establishment of a fixed link started as promptly as possible. The account given by the Minister for Public Works was generally well received by Parliament.

E. The Present Project

1. THE 1986 POLITICAL AGREEMENT

96. Talks between a liberal/conservative Government established in 1982 and the Social Democratic Party, the largest party in Denmark, led to a Political Agreement of 12 June 1986 on the Construction of a Fixed Traffic Link across the Great Belt (Annex 22). The Agreement provided for a two-phased establishment of a fixed traffic link across the Great Belt. The first phase was to be a rail link, followed by a 4-lane motorway connection as the second phase. Both rail and road connections were to cross the Western Channel on a low-level bridge. The rail connection across the Eastern Channel was to be through a tunnel. The motorway connection across the Eastern Channel belonging to the second phase was planned with a high-level bridge as the primary option. The Agreement also states that the experiences from the tender procedure concerning the rail tunnel could be taken into account by the parties when considering whether to invite tenders for a high-level bridge as well as an immersed tunnel for the road link across the Eastern Channel see Section 1 of the Agreement.

97. The rail connection was to be built as the first stage of the Project. The second stage of the Project, the motorway connection, was to be started at least one year prior to the start of operating the rail connection.

2. THE 1987 ACT

98. In order to have the 1986 Political Agreement passed into law the Minister for Public Works on 21 January 1987 submitted a Bill on the Construction of a Fixed Link across the Great Belt (Annex 23). The Bill was passed by Parliament and enacted as Act No. 380 of 10 June 1987 on the Construction of a Fixed Link across the Great Belt (Annex 24). The Act repealed the 1973 Act on the Construction of a Bridge across the Great Belt.

99. The wording of the Act and the comments to the Act clearly reflect that a high-level bridge across the Eastern Channel continued to be the primary solution. Section 4, Subsection 2 of the Act provides that the motorway link may cross the Eastern Channel on a high-level bridge or in an immersed tunnel. A project was to be prepared for the inclusion of the immersed tunnel in the invitation to submit tenders, if it is considered appropriate in terms of construction and economy to invite tenders for both alternatives. And in the comments to this Section it is stated that the Section is drafted to reflect the view that the high-level bridge still is the preferred alternative.

100. A State-owned company, *A/S Storebæltsforbindelsen*, had been incorporated already in January 1987. The purpose of this entity was to undertake the design and, as employer, the construction of the Fixed Link. The reason for choosing a joint stock company as the format for the organization of the Project instead of a separate administrative entity as was done with the initial project was to obtain the clearest possible separation between the economy of the Project and the budget of the State.

101. By Circular Note of 30 June 1987 the Danish Ministry of Foreign Affairs advised all Head of Foreign Diplomatic Missions accredited to Denmark of the Project (Annex 25). This Note did not give rise to any reactions from foreign States.

3. THE CONCEPTUAL DESIGN WORK

102. In July 1987 *A/S Storebæltsforbindelsen* commenced preparing a conceptual design for the Fixed Link to establish a basis for the subsequent tenders. While the Project was to be considered an integrated whole, a specified lead time of two to four years for the completion of the rail connection prior to the opening of the road connection initially focused attention on the rail component of the Project.

103. At the end of 1987 conceptual designs had been drawn up for all three major sub-components of the Fixed Link, the East Tunnel, the West Bridge and the East Bridge. The three sub-components were to combine into a double-track railway and a 4-lane motorway reaching 18 kilometres from Knudshoved on Funen to *Halsskov* on Zealand. An artificial island just to the north of *Sprogø* would provide the interface between the Eastern and the Western halves of the Project.

104. The East Tunnel provides the rail connection between *Sprogø* and *Halsskov* at Zealand, a distance of 8 kilometres. The conceptual design called for either a bored tunnel of a total length of 7.9 kilometres or an immersed tunnel.

105. The West Bridge spans the 6.6 kilometres between *Knudshoved* at Funen and *Sprogø*, carrying both road and rail traffic. The 1987 conceptual design provided for three alternative superstructures: a double deck composite steel/concrete girder, as well as concrete or steel girders in one level only. Bridge clearance was initially set at 14 metres, but was later changed to 18 metres in order not to force smaller craft to use the Eastern Channel.

106. The Eastern Road connection carries the road traffic from *Sprogø* to *Halsskov*. The conceptual design for the high-level bridge had two variants. A cable-stayed bridge with a main span of 780 metres with side spans of 300 metres or a suspension bridge with a main span of 1,416 metres and side spans of 400 metres i.e., the same main span lengths as were included in the 1978 Project by *Statsbroen Store Bælt*. Both alternatives for the main span were connected to the shore by approach spans 164 metres in length. The total length of the East bridge was to be 5.5 kilometres, supplemented by ramps at each end. The bridge clearance was initially set at 77 metres. The design for the cable-stayed bridge as well as for the suspension bridge was based on the specifications for the 1978

Project[19]. The secondary, immersed tunnel alternative had also two variations, a concrete or a steel tunnel.

107. Notice to tender by restricted procedure for the rail tunnel under the Eastern Channel was given on 28 July 1987. In November 1987 five engineering consortia were prequalified to bid for the work. Invitation for tenders were issued on 26 February 1988, and offers for the rail tunnel were submitted on 30 June 1988.

108. Notice to tender by restricted procedure for the Western Bridge was given on 9 October 1987. In March 1988 five engineering consortia were prequalified to bid for the work. Invitation for tenders were issued on 7 March 1988 and tenders were submitted on 30 November 1988.

4. THE FINAL OVERALL DESIGN

109. The 1986 Political Agreement provided that the experiences from the rail tunnel tender should be taken into account when deciding whether the motorway connection across the Eastern Channel should be tendered not only as an high-level bridge but also as an immersed tunnel.

110. The decision on whether to include a tunnel alternative in the invitation for tenders for the motorway connection across the Eastern Channel was to be taken by the Minister for Transport[20] after consultations with an informal parliamentary group of representatives from five political parties.

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[19] Figure i shows the design for the high-level suspension bridge across the Eastern Channel made by *A/S Storebæltsforbindelsen* and published in 1987.

[20] In 1987 the Ministry of Public Works was renamed the Ministry of Transport.

111. On 9 September 1988 *A/S Storebæltsforbindelsen* made a recommendation to the Minister for Transport concerning the final overall design of the Great Belt Project. *A/S Storebæltsforbindelsen* recommended that the road connection across the Eastern Channel should be carried out as a high-level bridge. The lowest cost for a high-level bridge would be DKK 5,350 million (USD 834 million) and the rail tunnel tender had indicated that the cost of an immersed tunnel would be DKK 1,300 million (USD 203 million) higher[21]. In addition operating and maintenance costs were expected to be more than 50 per cent. higher for the tunnel. The construction of an immersed tunnel would have an significant adverse impact on the marine environment.

112. On 14 October 1988 the political parties to the 1986 Political Agreement approved the recommendation made by *A/S Storebæltsforbindelsen*. On 4 November 1988 the Minister for Transport approved *A/S Storebæltsforbindelsen's* recommendation. On 9 November 1988 the Minister for Transport submitted to Parliament a written account on design of the Project as approved by him (Annex 26).

113. The Great Belt Project and its final design was subject to major national interest, and led at the time to wide coverage in Danish media. Also international news agencies and correspondents considered the bridge project newsworthy and the Project gave rise to both articles and comments in the Finnish media. In connection with an official visit to Finland by the Danish Prime Minister on 9 September 1988 the Swedish-language daily *"Hufvudstadsbladet"* carried the leader "A Bridge-Builder from Denmark" with reference to the plans for a bridge across the Great Belt (Annex 27). On 23 September 1988 *"Hufvudstadsbladet"* carried the article "The Great Belt gets its Bridge" describing the project as a rail tunnel and car bridge from Zealand to *Sprogø* and a combined road and

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[21] In this Counter-Memorial figures in Danish Kroner have been converted into US Dollars on the basis of the rate of exchange on 1 April 1992 when 100 US Dollars (USD) equalled Danish Kroner (DKK) 641.45.

motorway bridge from *Sprogø* to Funen (Annex 28). Equally on 23 September 1988 the Finnish-language *"Helsingin Sanomat"* carried the article "Bridge and Tunnel for the Great Belt" with mention of an 8 kilometres long bridge and a tunnel from Zealand to *Sprogø* and an equally long combined road and rail bridge from *Sprogø* to Funen (Annex 29)[22].

5. THE CONSTRUCTION

The Eastern Rail Tunnel

114. Pursuant to the political decision of 14 October 1988 and the decision of 4 November 1988 by the Ministør for Transport *A/S Storebæltsforbindelsen* on 28 November 1988 signed a contract with an international consortium, the MT Group, for the construction of a bored rail tunnel under the Eastern Channel with a contract sum of a total cost of DKK 3,074 million (USD 479 million).

115. As of 31 May 1991 a total of 861 metres out of a planned 2,433 metres of the East Tunnel had been bored. The delay was caused by a number of technical problems with the boring equipment. A further delay has been caused by a serious flooding incident on the *Sprogø* work site on 14 October 1991. As of 1 May 1992 a total of 1,742 metres of tunnel had been bored[23]. The completion of the tunnel boring is currently scheduled for the end of 1993, to be followed by rail installations.

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[22] The insinuations contained in para. 554 of the Memorial concerning the conduct of the Danish Government in this respect are clearly out of place. That there was nothing to hide is furthermore reflected in the enormous press coverage given to the Great Belt Project.

[23] Figure 2 shows part of the Eastern Rail Tunnel.

The West Bridge

116. Tenders for the West Bridge were submitted on 30 November 1988. In addition to bids adhering to the conceptual design given in the invitation to tender four alternative bridges and a number of variations on the original design were submitted. On 26 June 1988 *A/S Storebæltsforbindelsen* signed a contract with another international consortium, the European Storebaelt Group, for the construction of the West Bridge at a contract sum of DKK 3,157 million (USD 492 million).

117. As of 31 May 1991 four caissons had been lowered into the Western Channel on the Funen side. As of 1 May 1992 a total of 24 caissons, 21 road girders and 19 rail girders have been put in place, the bridge deck extends 2,177 metres across the Western Channel[24]. The completion of the West Bridge structure is currently scheduled for the end of 1993, to be followed by road and rail installations.

Land Works and Dredgings

118. The implementation of the Project involves the construction of major ramps along the island of *Sprogø*. Notice for tender by restricted procedure for these works was given on 28 July 1987, invitation for tenders issued on 28 April 1988, and tenders for the works were submitted on 24 January 1989. A contract for works amounting to DKK 316 million (USD 49 million) was signed on 26 June 1989. On 31 May 1991 the works were 87 per cent. completed[25].

119. Also substantial land works on Funen and Zealand have to be carried out in connection with the Project. These works are carried out by a number of contractors. The aggregate contract sum

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[24] Figure 3 shows the West Bridge.

[25] Figure 4 shows ramps along *Sprogø*.

for all land works is approximately DKK 650 million (USD 101 million). Initial tenders were held in April and May 1988 for both Funen and Zealand access and road works. As of 31 May 1991 DKK 320 million (USD 50 million) have been paid to the contractors[26].

120. Section 5 of the 1987 Act provides that for the sake of the marine environment the work in connection with the Great Belt Project shall be performed in such a way that the water flow through the Great Belt shall remain unchanged after the completion of the work. The reason for this provision is that a restriction of the flow could influence the salinity and oxygen content of the Baltic. Dredgings were carried out in 1990 to compensate for flow restrictions caused by ramps and bridge pillars. A total of 6.3 million cubic metres was dredged from the shoals surrounding *Sprogo*. Most of the material was reused in the *Sprogo* ramps and in four artificial islands constructed to streamline the East Bridge anchor blocks.

The East Bridge

121. Following the decision to invite tenders for a high-level bridge across the Eastern Channel, design analysis for the optimal bridge design was carried out during 1989. Notice for tender by restricted procedure for the East Bridge was given on 15 July 1989.

122. Section 4, Subsection 2 of the 1987 Act provides that the motorway may cross the Eastern Channel on a high-level bridge

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[26] The landworks on Funen included the dismantling of the *Knudshoved* motorway bridge referred to in para. 134 of the Memorial. The bridge was built as part of the 1983 programme to amalgamate car and rail ferry services across the Great Belt and was also designed to accommodate the approach road to a fixed link across the Great Belt as it was planned at the time. A decision made in 1989 to have all toll booths for the fixed link positioned on Zealand made it necessary to relocate the *Knudshoved* motorway bridge and consequently the original motorway bridge was dismantled in 1991 and substituted by a new bridge. A number of other installations relating to the ferry service, payment booths, queuing lanes etc., will also be demolished when the motorway link across the Great Belt opens.

with the required navigational clearance. In the comments to the Act it is mentioned that by the provision stating that the bridge shall have the required navigational clearance it is signified by the legislature that Denmark will adhere to its international obligations to maintain the free passage for ships. It is further mentioned that the high-level bridge probably would have a 76 - 77 metres clearance.

123. The expected clearance of the high-level bridge across the Eastern Channel stated in the comments to the 1987 Act was based on information obtained in 1986 by the Ministry of Industry.

124. In November 1988 *A/S Storebæltsforbindelsen* commissioned a study from *Det Norske Veritas* to investigate the air-draughts on normal oceangoing vessels, drill ships, semi-submersible drilling units, jack-ups, semi-submersibles, crane vessels, sailing ships, ice-breakers and fishing factory ships passing through the Great Belt. On 10 March 1989 *Det Norske Veritas* submitted an updated Revised Study on Air-Draught of Merchant Ships (Annex 30). On the basis of these investigations and after consultations with Danish authorities *A/S Storebæltsforbindelsen* submitted a recommendation to the Minister for Transport for a clearance of the East Bridge of 65 metres. On 16 June 1989 the Minister for Transport approved the recommendation.

125. On 24 October 1989 the Danish Ministry of Foreign Affairs issued a Circular Note containing supplementary information on the status of the Great Belt Project subsequent to its Circular Note of 30 June 1987. In particular the high-level bridge across the Eastern Channel was addressed and information given about the final design of the bridge including a vertical clearance of 65 metres (Annex 31).

126. In May 1990 seven engineering consortia were prequalified to bid for the East Bridge. Invitation for tenders for the

East Bridge was issued on 31 May 1990[27]. Tenders were submitted on 18 December 1990. The offers ranged from DKK 5,400 million - DKK 10,000 million (USD 842 million - USD 1,559 million). On 17 June 1991 the Minister for Transport authorised *A/S Storebæltsforbindelsen* to enter into final contract negotiations with the financially most advantageous bids for the bridge substructure and for the superstructure.

127. On 22 October 1991 contracts were signed with an international consortium, Great Belt-East Bridge Contractors, for the substructure and with another international consortium, *CMF Sud*, for the superstructure. The total contract price for the East Bridge was DKK 5,400 million (USD 842 million)[28].

F. Conclusion

128. The completion of the Great Belt Project will fulfil the long-standing need for a fixed link across the Great Belt. The barrier between the two parts of Denmark caused by the Great Belt will be overcome.

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[27] In the final design of the high-level bridge across the Eastern Channel the main span was increased to 1,624 metres to further improve navigational safety. Figure 1 shows the final design of the East Bridge and Figure 5 shows a model of the East Bridge.

[28] In para. 158 of the Memorial, it is stated, that "(e)ven as the contracts were signed...a further modification was made". The wording seems to suggest that *A/S Storebæltsforbindelsen* at the time as well could have made an additional change by making an opening in the bridge. The change referred to by Finland was due to the fact that the alternative *CMF Sud* project differed from the tender project in that advances in steel alloy technique had made it technologically feasible to increase the length of the approach spans by 25 metres to 193 metres. Like the substitution of a part of the *Sprogø* embankment by bridge spans adding five extra piers to the West Bridge this change was considered advantageous by *A/S Storebæltsforbindelsen*, as it would improve water flow through the Great Belt compared to the tender design and decrease the risk of ship collision.

129. The technical and economic aspects of a fixed link across the Great Belt have been the object of thorough analysis since the 1930s. After World War Two three substantial governmental reports on a fixed link across the Great Belt have been published. In 1960 by the Great Belt Bridge Commission, in 1968 by the Working Committee and in 1972 by the Technical Committee.

130. The 1960 Report by the Great Belt Bridge Commission concluded that it was technically possible to construct a bridge across the Great Belt. When such a project should be carried out was dependent on the social and economic conditions in Denmark. The Commission's recommendation that further preparatory work be carried out was followed by the Government and the Parliament. The 1961 Act on technical preparatory works to carry out a road and rail bridge across the Great Belt was passed unanimously by Parliament.

131. The 1968 Report by the Working Committee contained detailed plans for different solutions of the Fixed Link. These plans were further elaborated in the 1972 Report by the Technical Committee.

132. The 1973 Act on the Construction of a Bridge across the Great Belt was passed with a large majority in Parliament. The Act provided for a high-level bridge across the Eastern Channel.

133. From the Reports and the legislation it was evident from the beginning of the 1970s that it was no longer a question whether a bridge across the Great Belt would be built; the question was only when the project would be carried out. It was most likely that a fixed link across the Great Belt would be established within the coming decades. The 1960 Report had excluded a solution containing a bridge with an opening. From all plans and drawings existing at the time and available to the public it was manifest that the Fixed Link would comprise a high-level, fixed bridge across the Eastern Channel.

134. The Reports and the legislation evidence that securing the fulfilment of Denmark's obligations under international law in connection with the Great Belt Bridge Project has been an important part of the preparatory work. The position of the Government of Denmark has been unambiguous and clear. The bridge across the Eastern Channel should have a vertical clearance which would allow all existing ships to pass under the bridge. The Government's position was explained in the comments to the 1973 Act and in the legal opinions rendered in 1957, 1962 and 1971 by the late professor Max Sørensen, international legal adviser to the Danish Ministry of Foreign Affairs, and published in the 1960, 1968 and 1972 Reports. In the 1971 opinion by professor Max Sørensen it was made clear "that floating units such as offshore drilling rigs which might pass...under towage" were not to be taken into consideration in deciding on the vertical clearance of a bridge across an international strait.

135. The Circular Note of 12 May 1977 informed other States of the construction of a bridge with a free vertical clearance of 62 metres across the Eastern Channel. The Note demonstrated that Denmark was of the opinion that a bridge with such vertical clearance would conform with international law and consequently, that floating units such as drilling rigs with air draughts exceeding 62 metres did not have a right of passage through the Great Belt after the completion of the bridge across the Eastern Channel. Finnish shipyards had in May 1977 built seven semi-submersibles with air draughts exceeding 62 metres and had entered into contracts obliging to deliver an additional number of similar semi-submersibles. Finland did not react to the 1977 Note, thereby giving Denmark reason to believe that Finland shared Denmarks views as to offshore units' restricted entitlement to passage through the Great Belt.

136. The suspension of the Great Belt Project in August 1978 was part of a new coalition Government's austerity program. The new Government expected the Project to be resumed after a period of 4 - 5 years. It was evident to everyone having an interest

in the Project that it was only a question of time before it would be resumed. This is demonstrated by the Note of 18 January 1979 from the USSR to Denmark requesting further information on the Project (Annex 19).

137. In 1983 the work on the Great Belt Project was resumed with a view to updating the technological and economic basis for the 1978 Project. In 1986 a political agreement was reached on the Fixed Link across the Great Belt, and the agreement was transformed into the 1987 Act. Even though an immersed road tunnel is mentioned as a possibility, it was clear that a high-level bridge across the Eastern Channel was considered the primary option, and on 9 September 1988 *A/S Storebæltsforbindelsen* recommended to the Minister for Transport that the road connection across the Eastern Channel be carried out as a high-level bridge. Also in September 1988 the Finnish newspapers carried articles and editorials on the Great Belt Project mentioning the high-level bridge across the Eastern Channel.

138. The Great Belt Project is an integrated whole. The unity of the Project has been manifest from the very beginning and has been evidenced by the 1973 Act, the 1987 Act and the 1987 Note. In June 1990 when the first Finnish Note concerning the Great Belt Bridge was sent to the Danish Ministry of Foreign Affairs the Project was at an advanced stage. Work on the East Tunnel and the West Bridge had started long before. Design works for the East Bridge were carried out, and tender procedure for the East Bridge had been initiated. Substantial land works and dredgings had been completed.

139. The construction costs of the Great Belt Project was in 1991 forecasted to be DKK 19,030 million (USD 2,967 million) in 1988 prices excluding financial costs. In May 1991 when Finland initiated legal proceedings 56 per cent. of the total construction budget for the Great Belt had been contracted for, and DKK 5,600 million (USD 873 million) corresponding to 28 per cent. of the total

construction budget for the Great Belt Project had been paid to the contractors.

140. The total amount used in May 1991 on the part of the Project relating to the East Bridge was DKK 740 million (USD 115 million). The amount covers design works, soil investigations and land works for the East Bridge. The cost of removing land works already carried out in May 1991 for the East Bridge is estimated at between DKK 100 million - DKK 200 million (USD 16 million - USD 31 million).

141. After more than 40 years of planning and close to 4 years of construction the completion of the Great Belt Project is within sight. For Denmark the completion of the Fixed Link across the Great Belt will be of major importance. A barrier dividing the country will be overcome. Internationally the Great Belt Project is recognized as a significant improvement of the traffic links between Central Europe and the Nordic countries. The socio-economic importance of the Great Belt Project is explained in the following Chapter III. A detailed description of the effect of the Great Belt Project on traffic through the Danish straits is given in Chapters IV - VIII.

CHAPTER III.

THE SOCIO-ECONOMIC IMPORTANCE OF THE GREAT BELT PROJECT

A. National Considerations

142. A brief look at the Danish geography explains the urgent desire held through many decades for a fixed link across the Great Belt and the broad support expressed in Parliament for a fixed link. Denmark belongs to the very small group of states with population and land area split between a number of major islands divided by relatively narrow straits.

143. During the 20th century a number of Danish islands have been linked by bridges. These important improvements of the Danish infrastructure have been a necessary precondition for the establishment of a modern society able to maintain a reasonable standard of living for the whole population despite lack of onshore mineral resources.

144. The Great Belt is a barrier between the Eastern and the Western parts of Denmark. Western Denmark covers 78 per cent. and Eastern Denmark 22 per cent. of the aggregate Danish land area, while the population is split with 55 per cent. west of the Great Belt and 45 per cent. east of the Great Belt.

145. Figure 6 shows a Map with the population (numbers in millions) living in Jutland and on Funen west of the Great Belt, and on Zealand and the islands south of Zealand east of the Great Belt. The Map also shows the main bridges in Denmark linking together the various parts of the Kingdom.

146. Copenhagen, the capital of Denmark, is situated on Zealand. The major part of the central administration, cultural institutions of major importance for the national heritage and a substantial part of the Danish business community are placed in or around Copenhagen. Transportation of passengers and goods between the two parts of the country and from the part of the country east of the Great Belt to the European continent has to take place by ship or air until the Fixed Link across the Great Belt has been established.

147. The Great Belt constitutes a time barrier to transport, ferries being markedly slower and less flexible than land transport. With the most modern ferry equipment passage across the Great Belt lasts an average of 90 minutes for car and 75 minutes for train traffic, including average queuing and loading time. Added to this is the inconvenience of depending on another means of transport and being locked into fixed ferry time schedules unconnected to the steady and continuous rhythm of land traffic. In high season the Great Belt is a major traffic bottleneck with waiting times of up to 3 - 4 hours not uncommon, necessitating reservations weeks in advance.

148. The Great Belt is a restraint on the development of Danish society, the Belt curtailing traffic and trading between Eastern and Western Denmark. The negative effect on traffic of the Great Belt is illustrated by the traffic figures between the major parts of Denmark and between Denmark and Germany. Figure 7 shows the number of cars annually passing the Little Belt, the Great Belt, the *Storstrom*, the Kattegat (Jutland - Zealand), the *Fehmarn* Belt (*Lolland/Falster* - Germany), and the Danish - German border. The figures are based on traffic countings carried out by *Vejdirektoratet* (The Danish Road Directorate) in 1988. Numbers are quoted in millions.

149. The relationship between traffic across the Little Belt and the Great Belt is remarkable. Traffic across the Little Belt is 4.5 times greater than traffic across the Great Belt. This fact is even more remarkable, taking into consideration the population figures listed in Figure 6 and that the political and administrative centre of Denmark is placed on Zealand.

150. The local traffic between Zealand and *Lolland/Falster* is 4.4 million vehicles annually, more than 1.5 times the average traffic across the Great Belt of 2.7 million vehicles annually. The population of Funen is five times the size of the population of *Lolland/Falster*. With the Fixed Link across the Great Belt established population figures indicate a traffic volume across the Great Belt five times bigger than the volume from Zealand to *Lolland/Falster*.

151. The Great Belt is a barrier to trade between Eastern and Western Denmark. Trade links across the Great Belt are comparatively weak, as evidenced by the mainly long-distance traffic across the Great Belt. Regional short-distance traffic and commuting across the Great Belt is minimal. Studies made in 1987 on the regional goods flow calculated on the basis of transported tonne kilometres by lorries of over 6 tonnes confirm the view of the Great Belt as a significant trade barrier.

TABLE I Transport of Regional Goods (tonne kilometres) in 1987 by lorries of more than 6 tonnes gross weight.

From Funen to (per cent.):		From West Zealand to (per cent.):	
County of:		County of:	
Vejle (w)	25	*Roskilde* (e)	14
Aarhus (w)	19	*Storstrøm* (e)	24
West Zealand (e)	1	Funen (w)	2
Storstrøm (e)	1	*Aarhus* (w)	1
Total:		Total:	
West Denmark	89	East Denmark	89
East Denmark	11	West Denmark	11

(w) = west, (e) = east

152. The table shows that only 2 per cent. of transports from the County of Funen go to the neighbouring counties of Western Zealand and *Storstrøm* on the other side of the Great Belt. In comparison transports from Funen across the Little Belt bridges to the neighbouring counties of *Aarhus* and *Vejle* amount to 44 per cent. of the Funen total. This trend is repeated East of the Great Belt. Only 3 per cent. of transports from the county of Western Zealand go to the neighbouring counties of Funen and *Aarhus*, while 38 per cent. go to *Roskilde* and *Storstrøms* counties.

153. The Great Belt divides markets restricting competition and hindering the establishment of economies of scale in production, transportation and warehousing. These restrictions have a negative impact on industrial development and economic growth.

154. The completion of the Great Belt connection significantly reduces transport time across the Great Belt. The passage time will fall from 90 to 15 minutes for cars and from 75 to 7 minutes for trains.

155. The reduction of transport times will have a substantial impact on Danish society. A business trip from the Eastern to the Western part of Denmark and back now normally requires a 2 day-trip or overtime work unless air transport is used. When the Fixed Link is established such a trip can take place within a normal working day. Similar advantages will apply to the transportation of goods and services. The yearly time savings for business traffic have been calculated as being equivalent to 3,000 man-years.

156. The Fixed Link provides an added safety that goods and traffic may pass the Belt continuously and without delay. This will enable trade and industry to achieve more efficient production and stock planning and goods distribution.

157. The Fixed Link will lead to a more effective utilization of transport materiel and resources, with ensuing savings in materiel and labour costs. These advantages accrue equally to domestic and foreign transport companies.

158. Within industry the concept of "just-in-time" production has become a major competition parameter. The "just-in-time" principle entails keeping stocks of raw material and semi-manufactured materials at a minimum, deliveries taking place only when necessitated by the production process. This decreases warehousing costs as well as capital bound up in stocks. The establishment of the permanent connection will considerably improve the possibilities for Danish industry of implementing the "just-in-time" production principle effectively.

159. The marked improvement of Danish transport infrastructure provided by the Fixed Link will be of major importance to businesses trading in perishable goods, depending on reliable transport at fixed times. This applies to *inter alia* transportation of flowers, vegetables, meat, fish and dairy products.

160. Recent business development trends point towards increasing specialization and dependence on subcontractors. The

improved transport links provided by the permanent connection will increase the possibilities of specialization and will give businesses hitherto restricted in their choice of sub-contractors new options across the Belt.

161. Numerous Danish businesses have been forced by the Great Belt barrier to operate warehouses both east and west of the Great Belt to ensure acceptable delivery times and reliability. The permanent connection will enable companies to amalgamate warehouses with accruing savings.

162. Equally, the permanent connection will simplify the distribution structure, making possible swift and reliable delivery to all customers in Denmark from one distribution point, with ensuing rationalization gains.

163. Transport time across the Great Belt and the risks of delays or irregularities in traffic have hitherto led service industries to establish branches on both sides of the Great Belt. The opening of the permanent connection will thus improve the possibilities of rendering service anywhere in Denmark within an acceptable time span from a single service point. Therefore, a concentration of points from where services are rendered is expected.

164. The advantages listed here will be present even though toll charges are to be paid for the use of the permanent connection. The time barrier is the essential bar to normal business relations, and this hindrance will be removed by the Fixed Link.

165. The discontinuation of the ferry traffic across the Great Belt will lead to energy savings, as ferry traffic is less energy effective than cars and trains moving under their own power. Transportation of cars by ferry consumes approximately 5 times more energy than the cars will use to cross on the bridge under their own power. Transportation of persons by ferry consume approximately 8 times more energy then by train. Yearly energy

savings are estimated to be equivalent to the average yearly energy consumption of 45,000 cars.

166. The establishment of the Fixed Link will lead to considerable savings on the operation of existing ferry services between Zealand and Funen and between Zealand and Jutland. Savings will be made on both operating and investment costs. Yearly savings on investment, operating and maintenance cost of ferries are estimated at DKK 1,555 million (USD 242 million), while yearly expenditures on investment, operating and maintenance for the Fixed Link are estimated at DKK 1,049 million (USD 164 million). Net yearly savings on investment, operation and maintenance can thus be estimated at DKK 506 million (USD 79 million).

167. In addition to the savings mentioned in paragraph 166 the Fixed Link will imply savings on business transportation, leisure trips and stocks. Yearly savings on business transportation costs are estimated at DKK 1,380 million (USD 215 million), yearly savings on leisure trips are estimated at DKK 269 million (USD 42 million) and yearly savings on stocks are estimated at DKK 178 million (USD 28 million), totalling DKK 1,827 million (USD 285 million).

168. The total yearly net economic benefits of the Fixed Link across the Great Belt can thus be estimated at DKK 2,333 million (USD 364 million). These calculations of the economic effect of the Project indicate a social rate of return of 11.8 per cent. per annum.

B. International Considerations

169. A significant part of the land traffic between the central parts of Europe and Scandinavia passes through Denmark. Consequently, the quality of the infrastructure in Denmark is of crucial importance to neighbouring countries. It is, therefore, not surprising that other countries have supported and encouraged the undertaking by Denmark of the Great Belt Project.

170. Subsequent to the enactment of the 1973 Act on the Construction of a Bridge across the Great Belt the Committee on Regional Policy and Transport established by the European Parliament issued a Report on permanent links across certain sea straits (Annex 32)[illegible].

171. The Report contains a Motion for a Resolution on Permanent links across certain sea straits. The Motion notes that certain sea straits within the Community constitute an impediment not only to the development of an inter-connected Community transport network, but also to the economic and social development of certain regions. While acknowledging the presence of existing air and sea links, the Motion goes on to recommend the establishment of permanent links. The Motion states that the European Parliament "(c)onsiders that the creation of such links would materially reduce transport cost and time between.... the Danish Islands (and) other Community countries... (and)... (r)ecognizes..that the social effects of new and easier links across sea straits are likely to be considerable, particularly on the out-lying areas of the Community...".

172. The Explanatory Statement to the Motion states that "(t)he bridge over the Great Belt will completely change the most important link between east and west in Denmark and will bring about a significant improvement in the links between Central Europe and Sweden via Jutland, Funen and Zealand ...".

173. The Motion was passed by the European Parliament on 12 December 1974 and communicated to the Council and the European Commission.

174. International recognition of the socio-economic importance of the Great Belt Project not only in a Danish context but in a wider European perspective is evidenced by Council Regulation

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[illegible] Report of 5 November 1974, Dokument 319/74

(EEC) No. 3359/90 of 20 November 1990 for an action programme in the field of transport infrastructure with a view to the completion of an integrated transport market in 1992 (Annex 33).

175. Finally, on 21 June 1991 a Report on relations between the European Community and the members of EFTA in the transport sector was submitted to the European Parliament (Annex 34)[30]. This happened only shortly before Finland in its pleadings before the International Court of Justice in the hearings on the Request for the Indication of Provisional Measures in the present case, most surprisingly argued that *Rauma-Repola Offshore Oy* had experienced a drop in orders for offshore units "partially attributable" to the Great Belt Project.[31] The Report contains a Motion for a Resolution on relations between the European Community and the members of EFTA in the transport sector. The preamble to the Resolution states the importance of creating an integrated pan-European transport network and emphasizes the extensive efforts of the Scandinavian countries to complete the ScanLink project, including the Fixed Link across the Great Belt. In the Motion the Parliament calls on the Commission and the Council to recognize the importance to the Community of a number of major projects, including the ScanLink project containing the Great Belt bridge. The Governments of the EC and EFTA States participating in these projects are urged to take the decision to proceed and to complete the projects with the utmost dispatch. The explanatory statement emphasizes that Scandinavian cooperation on combined road/rail transport merits particular attention as a possible model for similar schemes elsewhere.

176. The Motion was passed by the European Parliament on 10 July 1991 and communicated to the Council and the

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[30] The EFTA countries are Austria, Finland, Iceland, Norway, Sweden, and Switzerland.

[31] Statement by counsel of Finland, Sir Ian Sinclair, 1 July 1991.

Commission as well as to the Governments and Parliaments of all EFTA member States, including Finland.

177. It seems reasonable to expect that Finland as a member of EFTA would at the time take an interest in cooperation within the transport sector between the EEC and EFTA, particularly in view of the European Parliamentary proceedings then in motion.

178. It is deplorable that Finland simultaneously by the use of ill founded allegations, should attempt to hold Denmark responsible for the lack of orders to a Finnish shipyard and to cause the Court to stop the Great Belt Project in its present form, a project that, apart from being of vital interest to Danish society, is also internationally recognized as a project of great importance for the relations between the other members of the European Community and the EFTA States.

CHAPTER IV.

THE PASSAGE OF SHIPS THROUGH THE GREAT BELT AFTER CONSTRUCTION OF THE EAST BRIDGE

A. The Clearance of the East Bridge

179. It has at all times been the stated objective of the Government of Denmark that the planned fixed link, particularly the dimensions of the vertical and horizontal clearance of the high-level bridge, should be in conformity with Denmark's obligations under international law to maintain passage through the Great Belt for all known ships likely to use the Great Belt. This was made clear in the Danish Public Works Acts from 1973 and 1987, as well as in Denmark's Notes to the diplomatic community in 1977 and 1987, see Chapter II, Part I of this Counter-Memorial.

180. The decision as to the exact height of the East Bridge was therefore preceded by years of careful analyses addressed to the issue of establishing the appropriate vertical and horizontal clearance of the high-level bridge which was to span the main navigational route in the Eastern Channel of the Great Belt.

181. As described in paragraphs 66 - 70 the Government of Denmark in 1977 notified all Missions accredited to Denmark that the high-level bridge across the Eastern Channel would have an operative clearance of 62 metres, and that Denmark considered this height to be in conformity with international law. In a Note sent in 1978 the Soviet Union requested that the clearance be increased to allow ships with a mast height of up to 65 metres to pass under the bridge.

182. In connection with the preparation of the 1987 Act on the Construction of a Fixed Link across the Great Belt the Danish Ministry of Industry in 1986 commissioned *Det Norske Veritas*, a Norwegian based international classification bureau for ships and offshore units, to examine the air draughts of the largest merchant

vessels and offshore units capable of passing through the Great Belt. The Report dated 5 February 1986 concluded that no cargo ship, tanker, sailing ship, passenger vessel, or naval vessel had an air draught in excess of 57 metres. The Report noted that the Soviet Union owned a number of drill ships with air draughts of 75 metres. Finally, it was mentioned that crane vessels and drilling rigs had air draughts ranging between 62 and 150 metres.

183. The vertical clearance of the high-level bridge was not laid down in the 1987 Act on the Construction of a Fixed Link across the Great Belt. However, in the official comments to the Bill, issued by the Ministry of Public Works, it was stated that the high-level bridge would probably need to have a clearance of 76 - 77 metres. This bridge height was anticipated to safeguard the continued passage through the Danish straits for drill ships, which had a recorded air draught of 75 metres.

184. Following the passing of the 1987 Act, *A/S Storebæltsforbindelsen* was charged with the responsibility of planning and supervising the construction of the Fixed Link. The authority to make a decision on the operative clearance of the East Bridge, however, rested with the Minister for Transport. Prior to submitting a recommendation to the Minister for Transport on what the appropriate clearance of the high-level bridge should be, *A/S Storebæltsforbindelsen* in 1989 commissioned *Det Norske Veritas* to execute a revised study on the air draught of the largest ships and offshore units in the world.

185. The Report from *Det Norske Veritas* concluded that all existing cargo vessels, tankers, passenger ships, ferries, sailing ships, ice breakers, and fishing factory ships in the world would be able to pass under an East Bridge with a clearance of 65 metres (Annex 30).

186. The *Veritas* Report demonstrated that out of all the above mentioned categories of ships only one vessel had an air draught in excess of 65 metres, namely the tanker or Ultra Large

Crude Carrier *Burma Endeavour* with an air draught of 68.5 metres in ballast draught[32]. However, if ballasted to the more relevant Route T draught of 15 metres *Burma Endeavour* (now *Stena Queen*) and its sister ship (*Stena King*) could sail under the Bridge with air draughts below 60 metres. Finland's contention that a bridge of 65 metres' clearance excludes the passage of certain ultra-large oil tankers is therefore not correct (para. 13, p. 7 of the Memorial). *Burma Endeavour* has never plied the Danish straits, and it is extremely unlikely that it will ever enter the Baltic, as the vessel will have a draught in excess of 15 metres already when loaded to one third of its loading capacity.

187. Finland points out that the Report from *Det Norske Veritas* identified "one type of large tanker with an air draught of 68 metres" and Finland goes on to state that "(i)t is hardly an insignificant category, however" (para. 221 of the Memorial). The *Veritas* Report did not identify a type of tanker; as recounted above it identified one tanker with a ballast air draught of 68 metres, which - notably - would not prevent the vessel from passing under the bridge. Thus, the application of the term "category" to two sister tankers does not seem appropriate.

188. Also in paragraph 221 of the Memorial Finland states that the number of cargo and passenger ships for which the bridge might cause difficulties is very small. That number is not only very small, it is simply nil. Neither *Det Norske Veritas* nor Finland has identified a single cargo or passenger ship with an air draught that would prevent it from passing under the East Bridge or passing through the Sound.

189. It should at this point be stressed that the *Veritas* Report also noted that the highest recorded air draught for an ordinary merchant vessel using the Great Belt in the period 1983 - 1988 was 52.5 metres, and that approximately 99 per cent. of all vessels

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[32] *Burma Endeavour* has a sister ship *Burma Enterprise* (now *Stena King*) with an air draught at ballast draught of 67 metres.

passing through the Great Belt in this period had air draughts below 40 metres.

190. The Report from *Det Norske Veritas* also demonstrated that a number of drill ships, semi-submersibles and jack-ups had air draughts in excess of 65 metres. The Report concluded that most drill ships had draughts that would allow them to pass through the Sound in fair weather, if necessary with tug assistance. Most jack-ups also had draughts that would allow them to be towed through the Sound. The Report finally demonstrated that a few crane vessels had air draughts of more than 65 metres, but that most did not.

191. On the basis of the results of the Report from *Det Norske Veritas* the *A/S Storebæltsforbindelsen* on 22 May 1989 recommended to the Minister for Transport that the vertical clearance of the East Bridge be established at 65 metres.

192. Before approving the precise clearance of the East Bridge the Minister for Transport was advised that the Danish Maritime Authority could endorse the proposed clearance of 65 metres. In its letter to the Minister for Transport of 23 May 1989 the Danish Maritime Authority referred to the findings of the *Veritas* Report, and in particular to the fact that drill ships would be able to pass through the Sound.

193. On 16 June 1989 the Minister for Transport approved a recommendation from *A/S Storebæltsforbindelsen* that the vertical clearance of the bridge be fixed at 65 metres. While a bridge with a free clearance of 65 metres would allow all existing ships to pass through the Great Belt it was clear that a number of mobile offshore drilling units would be up to 80 metres higher than the planned bridge. The drill ships could be directed to the Sound for passage through the Danish straits. Regarding the jack-up and the semi-submersible drilling rigs, the Government of Denmark was of the opinion then - as it is today - that, irrespective of their possibilities for utilizing the Sound for passage, these units did not

enjoy a right of passage under international law that could prevent Denmark from building a bridge across the Great Belt.

194. In its Note of 24 October 1989 the Danish Ministry of Foreign Affairs informed all Missions accredited to Denmark that the vertical clearance of the East Bridge would be 65 metres, and that the bridge would, in conformity with international law, maintain the free passage as in the past for all existing ships navigating the Great Belt.

B. The Effect of the East Bridge on the Passage of Existing Vessels

195. Following Finland's Application to the Court and the Court's Order on Finland's Request for provisional measures of 29 July 1991, the Government of Denmark decided to ask Lloyd's Register of Shipping in London to verify whether the findings of the Report from *Det Norske Veritas* were still valid, and submit a detailed analysis of the air draught and draught of the largest merchant vessels, special ships, drill ships, drilling platforms, and crane vessels.

196. In its Memorial paragraph 220 Finland states that "(g)eneralizations regarding ship heights worldwide can thus only be made with some hesitation" referring to the fact that the heights of vessels are rarely listed in e.g., Lloyd's Register. The Government of Denmark finds that the comprehensive study submitted by Lloyd's Register on the air draughts of the largest vessels should meet this reservation on the part of Finland.

197. Thus, in its Report of 5 May 1992, Lloyd's Register has confirmed the conclusion of the *Veritas* Report that all cargo vessels, tankers, passenger ships, ferries, naval vessels, ice breakers, and fishing factory ships in existence could pass under an East Bridge with a clearance of 65 metres (Annex 35). This conclusion

also applies to all vessels on order at the time of the filing of Lloyd's Register's Report.

198. Lloyd's Register has also found that, with the exception of three sister ships, no sailing ships have air draughts in excess of 65 metres. The first of these three sail assisted cruise ships were built in 1990 - subsequent, that is, to the submission of the Report by *Det Norske Veritas* and subsequent to the notice for tender of the East Bridge. According to information available *Club Med III* has not yet been delivered. *Club Med I* and *II* operate in the Mediterranean and the Caribbean. All three ships have an air draught of 68 metres and a draught of only 5.0 metres, which would allow them to transit through the Sound if they were to be utilized for cruises in the Baltic. The *Club Med* sail-assisted cruise ships are due to their exceptional air draught likely to be somewhat restricted in their sphere of operation in a few years' time as the final design of the future Messina Strait suspension bridge, which is expected to be submitted to the Italian Parliament, provides for a vertical clearance of 64 metres, see paragraphs 457 - 462.

199. Finland has devoted some attention to the issue of large passenger vessels and the possibility that they may in the future have air draughts in excess of 65 metres. What may be expected from future ship design is addressed in paragraphs 204 - 227 in this Counter-Memorial. At this point it should be noted that, according to Lloyd's Report, no passenger ships in existence or on order have air draughts in excess of 57 metres.

200. In the opinion of the Government of Denmark the findings of Lloyd's Register render Finland's observations in paragraphs 210 - 227 of the Memorial on the effects of the Fixed Link on passage by passenger ships, cargo ships, and Very Large Crude Carriers irrelevant as far as existing vessels and vessels currently on order are concerned. The East Bridge will in no way hamper the passage of these vessels through the Great Belt. The Reports prepared by *Det Norske Veritas* and Lloyd's Register irrefutably documents that the Fixed Link across the Great Belt will

not prevent any existing cruise ship, cargo ship, or tanker from passing through the Danish straits.

201. In paragraphs 294 - 298 of the Memorial and in Annex 87 Finland has addressed the impact of the future East Bridge on the transportation of large *cranes* from Finland, namely from the Finnish company *Kone Oy*, through the Danish straits. Transportation of cranes must be distinguished from the passage of *crane vessels*. The former is a land crane transported as cargo on a barge or a heavy-lift ship to be delivered and operated at an onshore destination. A crane vessel may be a ship, a barge or a semi-submersible with a permanently installed crane to be employed at sea primarily for assisting during the transportation, installation and operation of fixed offshore structures. Crane vessels proper and their possibilities for passage through the Danish straits in the future will be addressed separately in Chapter VIII.

202. The cranes transported by *Kone Oy* are land cranes. These cranes are thus merely cargo on the barge or the heavy-lift vessel, albeit quite tall cargo. A legal argument that a 100 metres tall land crane towed on a barge should in itself, as a piece of cargo, enjoy a right of passage under international law can hardly be sustained. Irrespective of such legal considerations the fact remains that *Kone Oy's* transport of cranes through the Danish straits will not be prevented by the future East Bridge. Since the cranes although tall are not very heavy, the draught of the vessel transporting the crane(s), be it a barge or a heavy-lift vessel, will be limited and the transport will invariably be able to pass through the Sound. This has not been disputed by Finland, and a fair number of *Kone Oy's* crane transports have indeed utilized the Sound. For purposes of illustration it may be noted that the heavy-lift ship with four cranes shown on page 100 of the Memorial has a registered maximum allowable draught at full load of 6.8 metres. The Report from Lloyd's Register demonstrates that transportation barges, which may carry cranes, oil rigs and other heavy and tall cargo, can go through the Sound with loads of up to 90,000 tonnes before the draught of the barge exceeds the safe draught in the Drogden

Channel in the Sound. An average jack-up rig weighs approximately 15,000 tonnes, and a land crane as shown on page 100 of the Memorial less than 1,000 tonnes. Transportation barges will thus be able to take any type of tall cargo with heights in excess of the clearance of the East Bridge to and from the Baltic through the Sound.

203. Lloyd's findings on the draughts and air draughts of mobile offshore drilling units and crane vessels will be addressed in Chapter VI and Chapter VIII.

C. The Effects of the East Bridge on the Passage of Future Vessels

204. In its submission Finland has asked the Court to adjudge and declare that there is a right of free passage through the Great Belt extending not only to existing vessels and offshore units but also to "reasonably foreseeable ships".

205. Finland observes that the bridge is expected to have a life span of 100 - 150 years, and that Denmark should therefore take foreseeable trends in ship design into account. Finland then ventures to state that "there are many kinds of ships under construction or design whose dimensions vastly exceed the height of 65 metres" (para. 5, p. 5 of the Memorial). Finland's assertion is clearly erroneous. As has been demonstrated, no ships with air draughts above 65 metres were under construction when the East Bridge was tendered, and since then only three sailing ships with air draughts above 65 metres that may comfortably sail through the Sound have been built.

206. According to Finland's argument on "reasonably foreseeable ships", Denmark must in its design of the Fixed Link across the Great Belt, particularly regarding the vertical clearance of the East Bridge, safeguard the passage not only of existing vessels but also of vessels not yet designed, much less constructed or even

contracted for. The legal merits of this argument will be addressed in Chapter III, Part II of this Counter-Memorial. Suffice it here to say that the Government of Denmark disputes that such an obligation exists.

207. Underlying Finland's legal argument that the Fixed Link across the Great Belt must also respect the right of passage of reasonably foreseeable vessels is of course an assertion of fact. It is an assertion of fact that the East Bridge with its vertical clearance of 65 metres will prevent the future passage of reasonably foreseeable ships through the Great Belt, see e.g., Finland's Memorial paragraphs 160, 218, 226, and 232 - 241. Notwithstanding the invalidity of Finland's legal argument, this section will examine the merits of the Finnish contention purely as a point of fact; are reasonably foreseeable vessels likely to have air draughts in excess of 65 metres?

208. At the request of the Government of Denmark, British Maritime Technology (BMT)[33] has addressed this topic in a report dated 6 May 1992 (Annex 36). On the basis of the findings of British Maritime Technology Ltd. the anticipated trends in future design, particularly with regard to air draught, of various categories of vessels are addressed in the following paragraphs.

209. Nowhere does Finland define what is meant by "reasonably foreseeable". The Government of Denmark assumes that the mere physical possibility that a ship with dimensions exceeding those known today may be built is not sufficient to establish reasonable foreseeability, and that a higher degree of probability is required. Obviously, the time span to be considered cannot be the 100 - 150 years suggested by Finland referring to the estimated life-time of the East Bridge. If a prediction on the future design of ships is to prove meaningful, it must be limited to an

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[33] British Maritime Technology is a large group of companies one of which, BMT Cortec Ltd., a firm of consulting engineers and naval architects, has prepared the Report.

assessment of whether existing design ideas, judged by today's design parameters, are viable and realistic, and whether these design ideas are more likely than not to reach fruition within the immediate years to come.

210. Based on the opinions stated by British Maritime Technology Denmark submits that it is not likely that passenger vessels, cargo ships, tankers, and naval vessels or any other ship to be built in the foreseeable future will have air draughts in excess of 65 metres. It may at any rate be safely assumed that no future vessel, which may meaningfully be characterized as "reasonably foreseeable", will have an air draught above 65 metres. The prospects for each category of vessel in question are summarized as follows.

Passenger Vessels

211. In paragraph 213 of the Memorial it is stated that "(m)odern passenger vessels are increasing their height as the need to take on board ever larger number of passengers grows", and in paragraph 215 Finland asserts that there has been "a clear trend during the past decades to increase air draughts". In paragraph 232 it is mentioned that the Finnish *Kværner Masa*-Yards is actively considering a cruise ship with an air draught of 70 metres.

212. Despite Finland's claim that the air draught of cruise ships has steadily increased, the fact remains that the largest cruise ships ever built, Normandie, Queen Mary and Queen Elizabeth (air draughts between 60 and 62 metres) were delivered in 1935, 1936, and 1938 respectively. None of these ships are in active use today. Since World War II only a few cruise ships have been built with air draughts above 50 metres and only a very few sailing ships have had air draughts above 60 metres, see e.g., Annex 42 to the Memorial. Annex 37 to this Counter-Memorial is a diagram showing the air draughts of the largest passenger vessels in the twentieth century. (Sailing ships have low draughts, which permit passage through the Sound, and are therefore not included in this

diagram.) Thus, contrary to Finland's allegation, the air draughts of very large cruisers have decreased rather than increased over the past 50 - 60 years.

213. Finland seems to consider it likely, or at least possible that passenger ships with air draughts in excess of 65 metres will be constructed in the foreseeable future, see e.g., paragraph 232 of the Memorial. However, the Report from BMT suggests that for a variety of reasons it seems unlikely that future cruisers and other passenger ships will have air draughts above 65 metres.

214. Firstly, the dimensions of the Panama Canal have hitherto strongly influenced the main dimensions of large passenger ships as well as cargo ships. This means that the air draught of these ships cannot exceed the 60 metres free clearance maximum of the Thatcher Ferry Bridge. The clearances of the bridges at the entrances to the ports of New York (66 metres), San Francisco (67 metres), and Istanbul (64 metres) are other obvious design parameters. The substantial building costs of a modern cruiser and the importance of ensuring a geographically unrestricted sphere of operation are likely to deter investors from building cruisers that cannot call in the above-mentioned ports or make a swift and inexpensive transfer between the Pacific and the Atlantic oceans through the Panama Canal. It is important to note that even the few, so far unexecuted, designs for extremely large cruise ships that have been drawn up and seriously considered for implementation in recent years had air draughts below 65 metres precisely for the reasons mentioned above.

215. Secondly, the height and the breadth of a vessel are inter-dependent factors. In simple terms, a great height or air draught of a vessel presupposes a large breadth. A very wide ship will invariably have a tendency to roll with stronger accelerations, which is a highly undesirable feature in a cruise ship. In addition, a ship with an extreme air draught e.g., in excess of 65 metres, will have many cabins and passenger areas high above the centre of gravity at an altitude where the horizontal movements of the vessel

reach their peak causing discomfort to the passengers. Since there is thus a limit to how wide a cruise ship may be, there is a corresponding limit to how tall the ship may be.

216. Thirdly, in marked contrast to what Finland asserts in paragraph 237, BMT concludes that economies of scale have not been demonstrated by the few designs for very large cruise ships that have been drawn up. On the contrary, when the vessel reaches a certain size the construction price per passenger apparently increases rather than decreases. Since the construction costs are considerable to begin with and the reduced flexibility of operating one huge rather than two smaller cruise ships is very significant, economic considerations will generally militate against rather than favour the construction of mammoth cruisers.

217. The development of the *World City* (formerly *Phoenix*) project illustrates important limitations regarding the design of mammoth cruisers and may provide the best possible basis for predictions regarding the dimensions of future cruisers. *World City* was designed to be the world's largest cruise and hotel ship in the early 1980s (illustration in Annex 36). For the past decade the project has remained the most realistic of the mammoth cruiser designs, and intense efforts have been exerted to transform the concept from mere design to actual construction; so far to no avail.

218. Several explanations may be given for the apparent demise of the *World City* and similar projects: the immensity of the required investment, the logistics of operating a ship with around 5 - 6,000 passengers, the sea behaviour of a structure of this size, the absence of any economy of scale, and the scarcity of available docking and port facilities.

219. *World City* and *Ultimate Dream*, another design for a huge cruise vessel, are practically the only projects which have been developed beyond the mere initial design stage (illustration in Annex 36). For purposes of this case it is pertinent to note that - despite their unprecedented size - both these projects have air

draughts below 65 metres. A statement from World City Corporation in New York attests the fact that the clearance of the Verrazano Narrows Bridge in New York served as a primary design consideration and in fact dictated the air draught of *World City* (Annex 38). The *Ultimate Dream* was designed by *Knud E. Hansen A/S*, a Copenhagen firm of consulting naval architects and marine engineers. A statement from *Knud E. Hansen A/S* (Annex 39) confirms that the ability to pass under the Golden Gate Bridge and the Bosphorus Bridges (which have vertical clearances similar to and below that of the East Bridge) served as a primary design parameter for the *Ultimate Dream*. Both designs have masts that may be lowered to attain the required air draught. Presumably, constructing a very large cruise ship that cannot dock at e.g., the port of New York is an economic risk no cruise ship operator would care to take.

220. Neither *World City* nor *Ultimate Dream* or other designs for cruise ships of this unprecedented size have been carried to completion. To suggest that cruise ships with even larger dimensions than these, in particular with higher air draught than these, are likely to be built, let alone that such units may be characterized as "reasonably foreseeable ships" is unfounded.

221. Based on the estimates set out in the Report from BMT, Denmark is of the opinion that the probability that the passenger ships to be constructed in the coming years will have air draughts in excess of 65 metres is negligible or non-existent. Consequently, even assuming that Denmark was obliged to make the East Bridge conform to the expected trends in future ship design, which is disputed, "reasonably foreseeable" passenger vessels are not expected to have an air draught exceeding the clearance of the future East Bridge. Thus, Finland's contention that the design of the Great Belt link violates the right of passage of future passenger vessels lacks factual basis.

Tankers and Cargo Ships

222. Even the very largest of tankers with a dead weight tonnage in excess of 500,000 do not have air draughts above 65 metres. In any case, these ultra-large crude carriers usually have loaded draughts of around 25 metres preventing passage through the Danish straits to the Baltic in fully loaded condition. Baltic ports are therefore served by tankers approximately one third of the size of these ultra-large carriers. There is no reason why crude carriers, particularly not of the relevant Baltic size, should be constructed with air draughts above 65 metres. The rationale for such tall crude carriers simply cannot be demonstrated. In fact economic considerations speak in favour of utilizing smaller and mid-size tankers as they are more flexible and thus more economical than ultra large crude carriers.

223. Even the largest tankers to be constructed in the future are expected to have air draughts below that of the clearance of the East Bridge. According to size-influencing safety regulations for tankers recently adopted by the International Maritime Organization new tankers are to have double hull which will restrict the load capacity of the tanker[34]. The largest, future tankers are expected not to exceed a dead weight tonnage of 350,000 DWT. It may therefore be fairly safely assumed that future tankers will not have air draughts above the largest tankers in existence today, which weigh more than 550,000 DWT.

224. Cargo ships have recently been built with air draughts significantly above those of the previous generations. A few of these celluar container vessels even have air draughts exceeding 50 metres. Most existing container cranes in ports are not high enough to service these large vessels, and the vessels are thus restricted to calling only upon ports that have invested in the necessary new cranes. The ensuing loss of flexibility may be expected to counsel

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[34] IMO, Marine Environment Protection Committee, Annex 6 to Report 32/20, 24 March 1992.

against the building of many container ships of this class, let alone even taller cargo ships. The highest possible air draught for future container ships will also be restricted by the strength of the containers which are stacked on top of each other on the ship. In the Report from BMT the maximum attainable air draught of a future container vessel is calculated to be 62 - 65 metres. The loading capacity of such a vessel, however, would in the opinion of BMT be of such a magnitude to render it economically unfeasible for use in the Baltic.

225. Finland has noted that sail-assisted propulsion may be an attractive alternative for e.g., bulk carriers, see paragraph 218 of the Memorial. Experiments have been carried out with wind-assisted tankers and cargo ships, and a number were built in 1970s following the oil crisis. Despite the rigging, none on these vessels had air draughts in excess of 65 metres. The vessels have apparently not proved economical judging from the fact that sail propulsion has not been introduced on any major scale, the sizable test period notwithstanding.

Naval Vessels

226. Although some older naval vessels and a single modern air craft carrier have air draughts above 50 metres, there has in recent decades been a tendency to build smaller, more versatile units with much lower air draughts. These small craft are considered more viable due to the relative modesty of the building costs and the absence of the need for a fleet of support ships. Further, having several smaller vessels instead of one large vessel increase the operational flexibility and reduce the vulnerability of the fleet as a whole. Nothing suggests that future naval vessels will have air draughts exceeding or even approaching the free vertical clearance of the East Bridge.

Conclusion

227. Finland has contended that the design of the East Bridge across the Great Belt violates the right of passage of reasonably foreseeable ships. Denmark disputes that international law imposes a legal obligation of this nature upon Denmark. This legal argument notwithstanding Finland must be required to show that reasonably foreseeable ships will have air draughts of more than 65 metres. Finland has failed to do so. On the contrary, as has been demonstrated above, estimates made on the basis of existing design parameters reveal that the ships that will be constructed in the foreseeable future are very unlikely to have air draughts exceeding 65 metres, see Annex 36.

CHAPTER V.

THE PASSAGE OF DRILL SHIPS, DRILLING PLATFORMS, AND CRANE VESSELS THROUGH THE DANISH STRAITS AFTER THE CONSTRUCTION OF THE EAST BRIDGE

A. Introduction

228. Finland has failed to demonstrate that the construction of the East Bridge with its vertical clearance of 65 metres will prevent any existing ship, be it a passenger vessel, cargo ship, ultra-large tanker, naval vessel or other ship, from passing through the Danish straits.

229. This is hardly surprising as the object of Finland's concern since its first contact with the Danish authorities on this matter in July 1989 has been based on the impact of the Great Belt Project upon the passage of Finnish offshore structures through the Danish waters. Safeguarding the passage of offshore units through the Great Belt was indeed the sole objective of Finland's Request to the Court for the Indication of Provisional Measures.

230. Although Finland has argued that the mere possibility that future ships may have air draughts exceeding that of the Great Belt bridge cannot be disregarded, it must be emphasized that, viewed solely on the facts, the future East Bridge will be of no consequence whatsoever to the passage of existing ships through the Danish straits. Only mobile offshore drilling units and crane vessels have air draughts above 65 metres, and in order to establish what problems, if any, the East Bridge will pose to Finland the focus of the presentation of the relevant facts of the case will concentrate on the future possibilities for the passage of offshore craft through the Danish straits.

231. Finland has argued that if the East Bridge were to be built in its planned form "the offshore industry in Finland would be finished", see paragraph 18, page 8 of the Memorial.

232. In the period 1972 to the present the Finnish offshore industry, notably *Rauma-Repola Offshore Oy*, has delivered a total of 22 drill ships, semi-submersibles and jack-up drilling platforms, whereas the now defunct Finnish shipbuilding company *Wärtsilä* (continued as *Kværner Masa* Yards) has built crane vessels.

233. According to Finland, the competitiveness of this offshore building industry is threatened as the immediate effect of the East Bridge will be to close off passage through the Great Belt for mobile offshore drilling rigs, see page 83, Section D of the Memorial. Finland further claims that transit through another part of the Danish straits, the Sound, is not a technically relevant option, contending that transport of offshore craft through the Sound is physically impossible, see paragraphs 198 and 203 of the Memorial. Finally, it is asserted that having temporarily to dismantle either the top of the drilling tower to pass under the East Bridge or remove the thrusters to reduce draught and allow passage through the Sound would severely damage *Rauma-Repola Offshore's* competitiveness on the international market and simply not be feasible from an economic and logistical point of view (paras. 285 - 293).

234. Denmark disputes Finland's premises and, consequently, also Finland's conclusions. The first premise disputed by Denmark is a rather fundamental one; Denmark does not concur in Finland's view that the right of passage through the Great Belt for ships of all nations can be extended to drill ships, semi-submersibles, jack-ups, and crane vessels. This legal issue is addressed thoroughly in Part II of this Counter-Memorial.

235. In this part of the Counter-Memorial only the validity of Finland's factual contentions regarding the physical possibilities for future passage through the Danish straits for offshore units will be examined.

236. Using *Rauma-Repola's* total production till now as a basis for an evaluation of the future possibilities for transporting offshore units from Finland through the Danish straits, it will be demonstrated that all drill ships, all jack-ups, and most semi-submersibles produced by *Rauma-Repola* could have been transported through the Sound instead of through the Great Belt without requiring any technical modifications to the units prior or subsequent to passage.

237. A few of *Rauma-Repola's* semi-submersible platforms, because of their draught, could not have passed through the Sound where the guaranteed water depth is 7.7 metres. However, these units could have passed the Sound had their propulsion thrusters, which increase the draught of the unit, been fitted after passage through the Sound so as to allow passage. Another possibility would be to take off the top of the drilling tower of the unit prior to passage under the East Bridge, for final assembly north of the bridge. Denmark will show that these modifying operations are perfectly feasible, have been executed as a routine matter elsewhere in the world, and are much less time-consuming and costly than argued by Finland.

238. In summary, drill ships, jack-up rigs, semi-submersible rigs, and crane vessels may, after construction of the East Bridge, be transported through the Danish straits in one of the following ways:

(a) Transit through the Sound without technical alterations to the unit (drill ships, jack-ups, semi-submersibles, and crane vessels).

(b) Transit through the Sound subsequent to a reduction of the draught of the unit by relatively simple technical modifications such as the temporary dismantling of propulsion thrusters (semi-submersibles).

(c) Transit through the Great Belt with the top of the drilling tower dismantled for final assembly subsequent to passage of the East Bridge (semi-submersibles).

(d) Transit through the Great Belt without technical modifications after having ballasted the unit to the deepest draught possible in order to reduce air draught and allow passage under the East Bridge (semi-submersible drilling rigs and semi-submersible crane vessels).

239. In paragraphs 243 - 259 the relevant types of offshore units, their number, and typical dimensions will be briefly described.

240. A later part of this Counter-Memorial, Chapter VI, "The Sound is a Feasible Route for the Passage of Offshore Units through the Danish straits", will consider in detail the conditions for navigation in the Sound and address the past and future passages of offshore craft through the Sound (item (a) above).

241. The possibility of modifying offshore rigs by removing thrusters or dismantling the top of the drilling tower to facilitate passage through the Danish straits (items (b) and (c) above) will be analyzed in Chapter VII.

242. Finally, Chapter VIII will demonstrate that all crane vessels in the world, save four, may - without any technical modifications to the units - either transit the Great Belt, in some cases ballasted to the deepest draught possible to reduce air draught and make passage under the East Bridge possible (item (d) above), or go through the Sound.

B. Mobile Offshore Drilling Units

243. Mobile offshore drilling units, often referred to as MODUs, are structures designed to move or be moved in a floating condition from one offshore site to another. On site they drill either in floating condition or with the legs of the unit standing on the seabed. MODUs are usually divided into three distinct designs: drill ships, semi-submersible units, and jack-up units. Common to all three designs is the apparatus for drilling placed on the unit, notably the drill tower, or derrick, which handles the drill pipes and performs the actual drilling. Basically, the same types of derricks are installed on drill ships, semi-submersibles and jack-ups, and these drill towers come in standard dimensions, usually with a derrick height of 49 - 55 metres. Most MODUs have a total air draught of more than 65 metres, as the height of the derrick substructure and the height from the water line to the main deck where the derrick is placed must be added to the derrick height to determine the actual air draught of the unit.

244. All three types of MODUs have been produced at *Rauma-Repola Offshore Oy*. In addition *Rauma-Repola* has produced two Multi-purpose Support Vessels (often referred to as MSV's). These Multi-purpose Support Vessels are in principle semi-submersibles designed to undertake various tasks in connection with hydrocarbon exploration and production. Such units do not, however, have a derrick and will almost invariably have an air draught, at least in ballasted condition, below the 65 metres free clearance of the East Bridge.

245. The discussion on the passage of offshore craft through the Danish straits may be restricted to MODUs. Production platforms are often designed to be permanent fixtures on the sea bottom. The substructure being the largest part of the platform which extends from above the sea surface to the sea bed is transported from the fabrication yard to the offshore installation site in one piece. No such substructures have been produced in the Baltic. Other production platforms are made of concrete and are

towed floating in one piece to their location. These platforms have draughts of up to 200 metres and are thus already precluded from making any kind of transit through Danish waters.

Drill Ships

246. The drill ship is a surface type drilling unit. A drill ship has a regular ship hull and is in fact often a converted cargo carrier. Drill ships float when drilling and may operate both in deep and shallow water. Although anchored or kept in place by dynamic positioning devices (thrusters), a drill ship in operation will have an inferior stability compared to a regular platform. The advantage of drill ships is that they navigate as regular ships and may thus make long voyages more quickly and inexpensively than semi-submersible and jack-up platforms. Further, they have extensive storing capability, and are thus often used in areas with limited supply facilities.

247. The draughts of drill ships vary considerably depending on the amount of drill pipes, drilling equipment and general load carried. The operational or maximum draught of more than 80 per cent. of all drill ships lie between 6 and 8 metres (Annex 35). The minimum transit draught of a drill ship is always significantly less than the operational draught, often up to 2 metres less, and the minimum transit draughts of most drill ships thus vary from 5 - 7 metres. Owing to the fact that standard derricks are employed, the air draughts of drill ships are quite uniform, approximately 75 metres at transit draught. The exact air draught of a drill ship is found by adding to the derrick height the height of the drill ship from the water line to the base of the derrick, usually a distance of 15 - 20 metres. The breadth of a drill ship is that of a regular hull and rarely exceeds 25 metres. Denmark agrees with Finland that the dimensions of future drill ships is not expected to undergo any radical change (para. 170 of the Memorial), and any increase in the draught is considered unlikely.

248. According to Offshore Data Services there are currently 36 drill ships in existence in the world. As of 1 May 1992, 18 of these 36 vessels are drilling; due to the current slump in the offshore market, the remaining vessels are "stacked" in various states of readiness for operation[35].

249. *Rauma-Repola Offshore Oy* has produced three of the currently active drill ships. It will be demonstrated that these three vessels are able to transit through the Sound without any technical modifications of the vessels and that at least one of these vessels has sailed through the Sound. Lloyd's Register concludes that all 36 drill ships in existence could sail through the Sound without any design modifications (Annex 35). Nine of the 36 drill ships would have to reduce their variable load e.g., mud, water, fuel to pass through the Sound.

Semi-Submersible Platforms

250. A semi-submersible drilling platform is a column stabilized drilling unit which may be specifically designed for harsh environments. The deck of the platform rests upon a number of columns supported by buoyancy pontoons. By pumping water into the ballast chambers in the pontoons and the columns the semi-submersible may attain a deep draught and thereby provide a stable working platform. During transport the water is pumped out to provide the rig with a lesser transit draught.

251. The semi-submersible platform drills in floating condition. During operation the rig is kept in place by conventional mooring systems or, in modern units, by dynamic positioning. Dynamic positioning is effected by large azimuth thrusters, or propellers, installed on the rig. Although thrusters may also be used as the only means of propulsion for shorter transports, e.g., on

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[35] *Offshore Rig Locator*, Vol. 19 No. 5, May 1, 1992.

location transfers, semi-submersibles are generally towed over longer distances. Semi-submersibles are used for drilling in deeper waters i.e., with a typical minimum water depth requirement, depending on design and environment, ranging between 40 - 100 metres.

252. According to Offshore Data Services there are currently 168 semi-submersible drilling platforms in existence. 108 of these rigs are currently drilling, whereas 60 are without contracts[36]. Most semi-submersibles have registered transit draughts of between 6 and 8 metres. However, this registered transit draught is often not the lightest draught attainable, as it is usually listed with a displacement that includes all equipment and materials required for drilling purposes i.e., a variable load which it is neither common nor necessary to carry e.g., on a delivery voyage from a yard.

253. As in any other unit, the air draught of a semi-submersible is a function of the draught, and as the draught of a semi-submersible may vary from around 6 metres in transit condition up to a deepest draught of more than 25 metres, the air draught varies accordingly. In transit condition the air draught of semi-submersibles range from approximately 75 to 100 metres. The breadth of a modern semi-submersible rig varies from approximately 60 to 100 metres. According to Lloyd's Register about two thirds of all semi-submersibles in existence have transit draughts of less than 7.2 metres in fully loaded condition.

254. *Rauma-Repola Offshore Oy* has produced 14 semi-submersible drilling rigs and 2 semi-submersible Multi-purpose Support Vessels. It will be demonstrated that all *Rauma-Repola* built semi-submersibles and most other semi-submersibles in the world may be transported through the Sound. Most *Rauma-Repola* units could be towed through the Sound either without any modification to the rig at all or subject only to an adjustment of the

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[36] *Offshore Rig Locator*, Vol. 19, No. 5, May 1, 1992.

variable load carried on the rig. A very few *Rauma-Repola* semi-submersibles would have to undergo a technical modification to be able to be towed through the Sound or under the East Bridge, either in the form of a temporary dismantling of the thrusters of the rig or in the form of a final fitting of the top of the derrick after passage of the East Bridge. The Multi-purpose Support semi-submersibles do not have derricks and thus will not have problems passing under the future East Bridge.

Jack-Up Platforms

255. A jack-up is a self-elevating drilling platform. During transport of the rig the hull of the platform floats while almost the full length of the legs of the rig protrude above sea level. Once on site at the drilling location, the legs will be lowered to stand on the seabed, and the hull will be jacked up to rest at a safe distance above sea level. The bottom of the legs are fitted with so-called spud cans to ensure a safe penetration into the seabed. On modern jack-up drilling rigs the end of the legs including the spud cans may be retracted into the hull of the jack-up during transport and thus do not increase the transit draught of the platform. Drilling is performed using a derrick installed on the platform.

256. Depending on design and environmental conditions jack-ups are used for drilling in water depths from a few metres to well over 100 metres. The length of the legs of a self-elevating platform determines the air draught of the unit, and are usually in the range of 100-150 metres, but some units may have air draughts of up to 170 metres. The breadth of the jack-up unit may be close to 100 metres.

257. Large modern jack-ups never have their own propulsion and are normally transported in floating condition towed by tugs (wet tow). The floating transit draughts of the majority of the jack-up platforms are between 5 and 7 metres. Jack-ups may also be transported on barges pulled by tugs (dry tow). This transport mode may give an even smaller transit draught than the wet tow described

above. For very long, often trans-oceanic, moves self-elevating platforms are sometimes carried on heavy-lift ships. The heavy-lift vessel will have a draught that is significantly deeper than the jack-up itself would have when towed. As stated by Finland, the draughts of jack-up rig have not changed much over the years (para. 181 of the Memorial), and in fact modern jack-ups tend to have lesser transit draughts than older ones. This lesser draught may be ascribed to the fact that practically all modern jack-ups have retractable spud cans as well as to the fact that a large draught limits or prevents the use of heavy-lift ships for transporting the jack-up units.

258. With a total number of 399, jack-up platforms make up around two thirds of the combined MODU fleet (which counts a total of 603 units). Out of these jack-ups, 249 units are working while 150 units currently remain idle. For MODUs as a whole there is as of May 1992 a surplus rig capacity of 37 per cent[37].

259. *Rauma-Repola* has produced 2 jack-ups independently and one in cooperation with the *Vyborg* Shipyard in Russia. Another joint *Rauma-Repola/Vyborg* jack-up is still under construction in *Vyborg*. It will be demonstrated that all self-elevating platforms built by *Rauma-Repola* and all other large modern jack-up platforms in the world have draughts that allow them to be towed through the Sound.

C. The Transport of Mobile Offshore Drilling Units

260. MODUs are characterized by their ability to move, or more often to be moved, from one drilling location to another. MODUs are primarily used for hydrocarbon exploration purposes, but also for production drilling in situations where the brevity of the drilling assignments in one place makes it economically more

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[37] *Offshore Rig Locator*, Vol. 19, No. 5, May 1, 1992.

advantageous to charter a mobile unit instead of using fixed drilling equipment.

261. The most important offshore areas in the world are widely dispersed across the globe. In terms of the number of units currently drilling, the most important offshore areas are, in order, the North Sea, the Gulf of Mexico, South East Asia, West Africa, Venezuela, the Arabian Gulf, the Indian Subcontinent, Brazil, the Red Sea, the former USSR, the Far East, and the Mediterranean[38]. Depending on the market situation, MODUs may make transfers from drill sites in one part of the world to assignments in another part of the world. Further, MODUs are often constructed far from the location where they will be put into operation. Finally, MODUs make frequent local transfers between different drilling sites within the same locality.

262. Basically, MODUs may be transported in three different ways: by independent navigation under their own propulsion, by being towed either on a barge or, more commonly, floating on the water, or by being carried (as cargo) on a specialized heavy-lift ship. The transportation method applied in a specific situation depends upon a number of circumstances, including the type of unit, the distance to be covered, the navigational conditions of the stretch of water to be crossed, economic considerations, and whether time is of the essence.

Independent Navigation

263. Drill ships have their own means of propulsion and may sail under their own power on short as well as on trans-oceanic moves. Some semi-submersible platforms also have their own means of propulsion. Depending on the type of thruster installed on the rig, these propeller-driven thrusters may be used for dynamic positioning of the rig during drilling operations and for making

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[38] *Offshore Rig Locator*, Vol. 19, No. 5, May 1, 1992.

shorter, unassisted transfers. Semi-submersibles with thrusters do not efficiently cover longer distances under their own propulsion and are therefore almost invariably towed by large tugs.

Towage

264. Towage is by far the most common way of transporting jack-up and semi-submersible platforms. Even semi-submersibles with their own means of propulsion are usually towed for longer moves. One or two tugs will normally be used to tow a jack-up, which will either be placed on a barge (dry tow) or more frequently float on the water (wet tow). A barge carrying, a jack-up will have a lesser draught than would the jack-up itself floating on the water. Semi-submersible units will normally be towed by one or two tugs on its own hull (wet tow). Semi-submersible units are not carried on barges, although very occasionally carried on heavy-lift ships.

265. Towage of MODUs is, as with any other offshore operation, subject to the influence of weather conditions. A MODU tow is not commenced unless weather conditions are suitable and the forecast is favourable. Any tow is carefully planned in advance e.g., to ascertain that there are suitable holding areas where the unit may "wait on weather" if conditions should deteriorate during the transport. A jack-up may lower its legs to rest on the sea bed and a semi-submersible may be ballasted down to its "survival draught".

266. Finland has emphasized that towage of a rig is more hazardous than carriage by heavy-lift ship (para. 200 of the Memorial). Denmark agrees that on a long, open-sea transport where severe weather conditions may be encountered heavy-lift transport involves fewer risks than towage of a jack-up rig does. But such considerations of safety do not apply to towing a rig through the Baltic Sea and through the Sound, which is well sheltered and where safe waiting areas are within easy reach in case the weather deteriorates.

267. The rig accidents referred to by Finland in paragraph 200 of the Memorial all occurred in open sea under severe weather conditions not experienced in the Danish straits and are therefore irrelevant for purposes of considering Denmark's proposal for towage of MODUs through the Sound.

Transport by Heavy-Lift Ship

268. For very long, e.g., ocean transports, jack-ups are frequently carried on heavy-lift ships. Semi-submersibles are transported this way less frequently. The heavy-lift ship is able to ballast down so that its cargo deck is underwater. The jack-up or semi-submersible unit is then floated over the cargo deck and the heavy-lift vessel is deballasted to lift the jack-up or semi-submersible unit out of the water. The unit is then secured to the deck of the heavy-lift ship before the commencement of the transportation voyage.

269. Carriage by heavy-lift ship is faster and usually safer than towing a jack-up across a deep-water ocean where there will neither be places to seek shelter nor shallow water to allow a survival lowering of the legs to wait out critical weather conditions. The disadvantage of heavy-lift ships is that they are expensive to hire, approximately USD 20,000 per day, and that loading/unloading and securing/unsecuring of the platform on the heavy-lift ship is in itself time-consuming. Invariably, heavy-lift ships will only be employed for longer hauls. In addition, according to Lloyd's Register of Shipping there are only 9 registered heavy-lift ships available worldwide leading to long transfers and thereby high mobilization costs. A rig owner's decision on whether to opt for a heavy-lift ship or for towage of the rig will depend primarily on economic aspects, and the decision will be made subsequent to a concrete analysis of costs. Finland's statement that jack-up rigs are towed only for distances of up to 1,000 nautical miles (para. 188 of the Memorial) is not correct, as there are many examples of jack-ups being towed for much longer distances.

270. A heavy-lift ship carrying a MODU may have a significantly deeper draught than the MODU it carries but this will be dependent on the size and weight of the MODU and the type of heavy-lift ship. The draught of a typical heavy-lift ship carrying a jack-up is typically about 8 to 10 metres. The loading and unloading of a platform requires an even larger draught to enable the heavy-lift ship to submerge its cargo deck sufficiently to allow the MODU to float over it.

271. Heavy-lift ships are not normally used for shorter transfers in sheltered waters due to the time and cost involved in mobilizing a heavy-lift vessel as well as the fact that the safety considerations apply to a much lesser extent, if at all, to towage in sheltered waters.

272. While it is obvious that carriage by heavy-lift ship is faster than towing a MODU, there are disadvantages of using heavy-lift vessels as well. In a number of instances jack-ups carried on heavy-lift ships have sustained damages. Accelerations on the unit due to motions of the heavy-lift ship may be higher than in a wet tow. Damage to the legs, jacking mechanisms and hull structures of jack-ups when carried on heavy-lift ships has occurred.

273. The number of yearly heavy-lift transports of MODUs is not precisely known. However, a check with the various heavy-lift transportation contractors indicates that the total number of transports is about 20 per year. These relatively few transports compares with hundreds of yearly movements under tow of the world's 399 jack-ups.

CHAPTER VI.

THE SOUND IS A FEASIBLE ROUTE FOR THE PASSAGE OF OFFSHORE UNITS

A. Introduction

274. The Baltic Sea is connected to the North Sea by three straits and a man-made canal. Since the present case is very much concerned with the alleged right of passage of exceptionally tall, Baltic-built offshore structures interest has focused on the Great Belt and the Sound.

275. Since Finland's first approach to the Government of Denmark in this matter Denmark has consistently argued that the Sound provides a viable route of passage for the Finnish offshore units transiting from the Baltic to the North Sea (para. 516 of this Counter-Memorial). Finland has declined to consider the Sound as an option for the transport of offshore structures. The Finnish Government primarily advanced an argument of impracticability, or even impossibility, of passage from a factual point of view. This contention will be addressed in the following.

276. In Chapter III of the Memorial Finland has argued that - as a point of fact - the Sound is not a relevant navigational alternative to the Great Belt. Finland refers to three arguments as a basis for this conclusion; the depth of the Sound is insufficient, part of the main navigational route in the Sound passes through Danish internal waters, and finally, that the planned fixed link between Denmark and Sweden may adversely affect navigation in the Sound. Further, in paragraphs 198 - 206 of the Memorial Finland has attempted to demonstrate that, especially for offshore structures transiting from the Baltic to the North Sea, the Sound is not a technically relevant option. For these offshore units, Finland asserts, "using the Sound is physically impossible".

277. The Government of Denmark cannot endorse Finland's description and conclusions regarding the Sound. This Chapter VI will seek to demonstrate in detail that the Sound is not only a very important, and in some respects the primary, navigational route between the Baltic and the North Sea, but also that, despite the fact that the depth of the Sound is only about half that of the Great Belt, it is still a perfectly feasible transit route for drill ships, semi-submersible and jack-up platforms as well as crane vessels. It will be documented that almost all *Rauma-Repola* built MODUs could - without any technical modifications to the rigs - have been transported through the Sound; a finding corroborated by the fact that a number of MODUs built at *Rauma-Repola* have in fact utilized the Sound rather than the Great Belt for passage between Finland and the North Sea.

B. Geography

278. The Sound (*Sundet*) is delimited from the Baltic Sea proper to the south by a line from *Falsterbo* in Sweden to *Stevns* Light on Zealand and from the *Kattegat* Sea to the north by a line running from *Gilbjerg Hoved* on Zealand to *Kullen* in Sweden (Map IV). The length of the main navigational north-south route through the Sound is approximately 56 nautical miles.

279. Transiting vessels may pass to the west and to the east of the Swedish island of *Ven* in the northern part of the strait. In the southern part of the strait, the navigational route splits into two. One passes between the Island of *Saltholm* and the Swedish coast through what is known as the Flinte Channel (*Flinterännan*). Most international traffic of ships (approximately 87 per cent. of all vessels) passes through the deeper Drogden Channel (*Drogden Rende*) between the west coast of *Saltholm* and the east coast of the island of *Amager*.

280. The route through the Flinte Channel and northwards in the Sound passes through Swedish and Danish territorial seas.

whereas the route west of *Saltholm* passes through internal Danish waters in the Drogden Channel.

281. The water depths in the navigational routes of the Sound vary considerably, and the shallowest points are found around the island of *Saltholm*, where the Swedish Flinte Channel has a depth of 7.2 metres, and the dredged Danish Drogden Channel a guaranteed minimum depth of 7.7 metres. In the following paragraphs, focus will be restricted to the main navigational route through the Drogden Channel.

282. The Drogden Channel is a natural channel in the shallow chalk-bottomed waters off the southwest coast of *Saltholm* (Map IV). The Channel has a length of 5.5 nautical miles and a minimum width of 290 metres. The channel has been dredged a number of times and today has a guaranteed minimum depth of 7.7 metres at mean sea level. The accuracy of the charted depth in the Drogden Channel is verified regularly by echo-sounding surveys.

283. Immediately to the north and to the south of the Drogden Channel the water depth increases to more than 10 metres. The water in the remaining parts of the navigational route through the Sound is relatively deep, falling gradually to 40 metres to the north of *Helsingør* and to 14 metres to the south of *Falsterbo*.

284. As will be demonstrated in Chapter X, the Drogden Channel is part of the international strait constituted by the Sound and thus governed by the Danish strait régime irrespective of the fact that it lies within the Danish straight baselines, see paragraphs 437 - 442.

C. Hydrography, Weather, Navigational Conditions, and Ship Positioning Systems in the Sound

285. In a section purporting to show why the Sound should be disregarded as a viable route for MODUs transiting the Danish

straits from the Baltic, Finland makes several observations on the hydrographical and weather conditions of that strait which call for clarification and rectification. Although recognizing that the tidal variation is insignificant, Finland emphasizes that the water level in the Drogden is subject to considerable seasonal and wind-induced variations, see paragraph 70 of the Memorial.

286. Since the Drogden Channel is the only shallow water area of the Sound any discussion of variation in water level should be limited to this area, as water level fluctuations in the deep-water areas elsewhere in the Sound are immaterial to the question of passage[39]. Finland contends that the official water depth of the Drogden Channel may be reduced by as much as 2 metres (para. 198). This is not correct. Variations of this magnitude are only - and rarely - found in the deep-water areas of the Sound. The greatest variation ever recorded in the Drogden Channel was 0.79 metres below mean sea level[40]. Such extreme fluctuations are not only rare but very brief, and may be predicted 48 hours in advance.

287. The water level and thus the water depth at the time of passage is obviously a factor that the master of a ship will have to take into account anywhere in the world when shallow waters are to be passed. In the Drogden, a master will have better knowledge of the current water depth than in most other waters. Firstly, approaching vessels may by radio request information on the water level in the Drogden which is measured every thirty minutes. Secondly, the Drogden is a dredged chalk channel where sedimentation does not occur, and it is probably the most closely surveyed area in the Danish waters, which ensures that the charted

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[39] The figures on water level variations quoted by Finland in Note 2 on p. 27 of the Memorial do not apply to the Drogden. The variation of 0.82 metres applies to *Helsingør* 23 nautical miles north of the Drogden, and the figure 0.88 metres refers to *Køge* 18 nautical miles west of the Drogden. The water depths in these two locations are about 25 metres and 8 metres, respectively.

[40] United States Defense Mapping Agency, Pub. No. 190, 3rd ed., page 124, table 9.

official minimum depth of 7.7 metres at mean sea level is entirely reliable. It may then be concluded that the water level variations in the Drogden proper are minimal, predictable, and of negligible consequence to commercial ships and offshore structures traversing the strait.

288. Finland suggests that the occurrence of ice during winter months make navigation through the Sound difficult and states that the problems caused by ice are significantly greater in the Sound than in the Great Belt (para. 72 of the Memorial). In fact ice rarely presents problems to navigation in Danish waters[41]. Within the past 20 year period (1971 - 1991) ice-strengthened vessels have experienced minor problems in only three years. In each of those three years, the number of days when ice posed difficulties to navigation was higher in the Great Belt than in the Sound[42]. In none of these years did ice prevent the passage of ice-strengthened vessels through the Sound.

289. In passing, it might be noted that the winters and the ice conditions in the waters off Finland are much more severe than in Danish waters. At least in February and March the entire coastal waters of Finland are normally covered by consolidated or compact pack ice, and the ice extends beyond the limit of the Finnish territorial waters[43]. It may therefore safely be assumed that if an offshore unit is able to depart from the yard in Finland during an ice winter, it will not experience any difficulty in traversing the usually ice-free Danish straits.

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[41] *Ibid.*

[42] According to the Danish Public Icebreaking Service, in the period 1971-1991 navigation was affected by ice in 1984/85, 1985/86, and 1986/87. In these years, the number of days when minor problems were experienced by ice-strengthened vessels was 38, 30, and 36 in the route through the Great Belt (in *Langelands Bælt*), and 29, 18, and 34 in the Drogden.

[43] United States Defense Mapping Agency, Pub. No. 190, 3rd ed., p. 135 - 36, and ice charts published by the Finnish Institute of Marine Research.

290. In order to promote the safety of navigation through the Danish waters, including the Great Belt and the Sound, the Danish authorities have established the SHIPPOS system. SHIPPOS is a radio reporting scheme according to which large vessels, offshore structures and other large units navigating the Danish waters may receive information on the positions and movements of other large vessels and units under tow in the area, navigational hazards *en route*, and deviations from normal conditions of e.g., current, water level, and wave height. Participation in the SHIPPOS system is voluntary, but the system is used by approximately 90 per cent. of all vessels transiting through the Great Belt with a draught of 13 metres or more[14].

291. Finland notes that the Drogden route has the additional disadvantage of passing by Copenhagen, where heavy traffic increases the risk of collision (para. 73 of the Memorial). As a remark made in the context of a comparison between the navigational routes through the Sound and the Great Belt, the statement lacks merit. The intensity of navigation in terms of the number of transiting vessels in the two routes is almost the same. Finland's reference to the proximity of the Drogden route to Copenhagen's international airport at *Kastrup* is similarly irrelevant (para. 74 of the Memorial). The Danish Maritime Authority has issued a guideline according to which all vessels and structures under tow with air draughts in excess of 35 metres are requested to report their approach two hours prior to passage of the airport, see Notice issued by the Danish Maritime Authority on 10 August 1989 (Annex 40). The advance notice allows the necessary coordination of maritime and air traffic during the time of passage. Such reporting schemes are found in various parts of the world, are well-known to the international shipping community and in no way hampers the passage of any vessel or MODU through this part of the Sound.

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[14] In Annex 32 to the Memorial, page 152, it is erroneously stated that participation in the SHIPPOS system is compulsory.

D. Underkeel Clearance in the Sound

292. Finland has devoted considerable attention to the issue of underkeel clearance for transport of MODUs (para. 75 and Annexes 4 and 32 to the Memorial). Denmark of course agrees that it is essential to ascertain what column of water a ship or an offshore unit must have under its keel in order to navigate or be towed safely through a given body of water. The determination of the proper underkeel clearance is the basic premise for evaluating whether offshore units including *Rauma-Repola's* past and future productions may be towed through the Sound. No underkeel clearance figure will have universal application, as the value must be established for each body of water and for each type of vessel on the basis of a number of criteria:

- the geographic location of the particular body of water, wind, tide, and other factors affecting the water level
- the nature and topography of the seabed and the reliability of the charted depths
- the type of unit in question, its sea behaviour, the salinity of the water, and other factors affecting the draught of the unit in the waters in question.

293. Determining the column of water under the keel required for safe passage is thus a very concrete task, inseparably tied to the specific navigational route examined. When assessing the underkeel clearance necessary in the Sound, or rather in the Drogden Channel, the validity of drawing parallels to waters elsewhere in the world is entirely dependent on complete or nearly complete comparability between the waters examined. This is clearly reflected in the marked difference between the Sound and the Great Belt with respect to underkeel clearance.

294. No Danish or international body has established a required underkeel clearance for navigation in Route T through the Great Belt or for navigation through the Sound. However, an underkeel clearance for vessels utilizing Route T has indirectly been

recommended - at least for larger vessels, whereas this is not the case for the route through the Sound.

295. To enhance the safety of navigation particularly for larger vessels utilizing Route T and thereby the Great Belt for transiting Danish waters, the International Maritime Organization, following a request from Denmark, adopted Resolution A.620(15) on Navigation through the Entrances to the Baltic Sea (Annex 41). Route T has a charted minimum depth of 17 metres, but Denmark wished that the international maritime community be made aware that in one section of Route T, in the area to the north-east of *Gedser* (Map I), "the charted depths, even under normal conditions, may be decreased by as much as 2 metres owing to unknown and moving obstructions"[45]. The variations relative to the charted depth north-east of Gedser are primarily caused by moving sandbanks.

296. Denmark had originally proposed a minimum underkeel clearance of 2 metres for passage through the Route T, but this proposal was not adopted by the IMO. Formally speaking Resolution A.620(15) does not establish or even recommend an underkeel clearance. It merely states the fact that the charted depth may be decreased, and recommends that ships of 40,000 DWT and above and ships with a draught in excess of 13 metres take certain precautions (Article 1(a) and 1(b) of the Resolution). For all practical purposes, however, the safe draught of ships and other structures passing this part of Route T is limited to 15 metres.

297. It has never been considered necessary to establish a recommended underkeel clearance or warn of risks of decreasing water depths in the Sound. The minimum water depth in the main navigational route through the Sound is 7.7 metres, this being the minimum depth of the dredged Drogden Channel. The applicable IMO Resolution A.579(14) on the Use of Pilotage in the Sound

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[45] IMO Resolution A.620(15) adopted on 19 November 1987, Article 1 (a). Resolution A.620(15) expressly revokes the previous Resolution A.339(IX) referred to in Annex 3 to the Memorial.

neither directly nor indirectly addresses the issue of underkeel clearance (Annex 42). The object of Resolution A.579(14) is to recommend that tankers with a draught of 7 metres or more, loaded chemical tankers and gas carriers, and ships carrying radioactive materials make use of the pilotage services established by the Governments of Denmark and Sweden.

298. The very different character of the most shallow point in Route T, the area north-east of *Gedser* (moving sandbanks), and the most shallow point in the Sound, the Drogden Channel (chalk bottom without sedimentation build up), explain the absence of an internationally sanctioned or an official Danish minimum underkeel clearance for the Sound. It is therefore wrong when Finland applies the two metre underkeel clearance implied in Resolution A.620(15) to the Sound (para. 75 of the Memorial). Even more misguided is Finland's comparative reference to the underkeel clearances established for the English Channel and for ultra-large crude carriers with draughts above 15 metres in the Malacca Strait (para. 75 of the Memorial). These straits really have only the existence of an international passage régime in common with the Sound, which is of course of no consequence in the determination of the appropriate underkeel clearance. In the English Channel e.g., there is considerable tide, tidal surges, risk of waves exceeding 6 metres in storms, and unknown movements of the seabed[46].

299. The absence of an official minimum underkeel clearance in the Sound conforms with internationally recognized practice according to which the national authorities inform shipping circles of the charted depth of the water and then leave it to the master of the vessel to deem which depth of water under the keel is needed for safe passage. The master will of course make that decision based on his knowledge on how his vessel or offshore structure behaves under different weather conditions and on the navigational

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[46] *Dover Strait Pilot Book.*

conditions in the fairway or channel which the vessel is about to enter.

300. The establishment of an appropriate underkeel clearance for the transport of MODUs through the Sound is assessed in detail in paragraphs 310 - 333, whereas the clearance for ships is addressed below.

E. Pilotage Services and Existing Ship Traffic in the Sound

301. Extensive pilotage services are available in Danish waters, both for international transit traffic and for traffic entering or leaving Danish ports. Contrary to what is stated in Annex 32 to the Memorial, pilotage for ships and for MODUs transiting Danish waters is optional, see paragraph 564.

302. The approximate annual number of ships utilizing the services offered by Danish pilots for passage through the Sound is 2,300. The pilots are experienced in handling both ordinary vessels and offshore structures under tow. For a north-bound passage through the Sound a Danish pilot will board the vessel either off the island of Bornholm or in the southern part of the Sound; for a south-bound passage the pilot will embark at Elsinore (Map IV). Before guiding a vessel through the Sound the pilot will measure the vessel's actual draught at the time passage is to be commenced.

303. The Danish pilots consider an underkeel clearance of 0.2 metres sufficient for the passage of ships through the Drogden. The short Drogden Channel is considered to be similar to a harbour entrance due to its sheltered location and the fact that it is a dredged fairway ensuring an absence of sedimentary deposits and full reliability of the charted depth.

304. The reliability of the charted depth in the dredged and surveyed Drogden Channel enables the pilot to know precisely how much water he has under the keel once the draught of the vessel

and the current water level have been measured. This is in marked contrast to the Malacca Strait and the Dover Strait referred to by Finland. As noted in *the Mariner's Handbook* "offshore surveys seldom attain the precision of those in sheltered inshore waters" and "the charted depths in offshore areas should not be regarded with the same confidence as those in inshore waters, or those in the approaches to certain ports where special provision is made to enable underkeel clearance to be reduced to a minimum"[47]. The special provisions referred to by *the Mariner's Handbook* would presumably be maintenance of the existing water depth by regular survey and further dredging if necessary, precisely the measures taken in the Drogden Channel.

305. In the *Baltic Deep-Sea Pilotage* published by the Baltic Pilotage Authorities Commission, a non-governmental organization consisting of the pilotage authorities in the countries adjacent to the Baltic Sea, the maximum draught for passage through the Sound by way of the Drogden Channel under normal weather and wind conditions is listed as 7.50 metres (Annex 43). This implies an underkeel clearance for regular ships of 0.2 metres.

306. An argument that an underkeel clearance for ships transiting through the Drogden of 0.2 metres is inadequate and unsafe cannot be sustained in view of the fact that this is the clearance recommended by the Sound pilots, officially promulgated by the Baltic Pilotage Authorities Commission, and, most importantly, the one utilized by international shipping.

307. According to the registers of the Danish Sound pilots, a total of 657 ships with draughts of 7.0 metres or more were piloted through the Sound in 1991. 116 of these ships had draughts of 7.4 metres and above, and some even had draughts measured by the pilots of 7.6 metres. This clearly demonstrates the masters'

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[47] *The Mariners Handbook*, NP 100, 6th ed., 1989, p. 21 and p. 32.

confidence in the accuracy of the charted depth in the Drogden channel and in the assistance provided by the pilots.

308. Finland has contended that several shipping companies have advised ships in excess of 3,000 - 4,000 DWT to use the Great Belt rather than the Sound (para. 73 of the Memorial). The contention is unsubstantiated, and it should not give rise to the erroneous inference that only a few ships above 4,000 DWT utilize the Sound. In fact 34 per cent. of all vessels navigating the Sound exceed 5,000 DWT. In 1990 the total number of passages through the Sound was calculated to be 21,385, and out of these more than 100 were ships above 40,000 DWT[48].

309. The inference that may be drawn from Finland's statement is also contradicted by the navigational practices of Finnish ships transiting the Danish straits. In the period 1987 - 1991, a total of 36 Finnish vessels with draughts of 7.0 metres and above passed through the Sound; the tonnage of these vessels ranged from 4,500 to 31,800 DWT (Annex 44).

F. Transport of Offshore Units through the Sound

310. The existing ship traffic in the Sound and the appropriate underkeel clearance for ships passing through the Drogden Channel has been addressed above. As documented in Chapter IV and V the only craft which have air draughts in excess of the free clearance of the future East Bridge are certain offshore units and crane vessels. The possibilities for transporting drill ships, semi-submersibles and jack-up platforms through the Sound will therefore be examined in some detail in the following. Crane vessels will be separately addressed in Chapter VIII.

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[48] Report from MSR Consultants: *Analyser af skibstrafikken i Øresund*, January 1991.

311. Finland has categorically discarded the possibility that offshore units could be transported through the Sound, using terminology such as "not a technically relevant option", "completely unavailable", and "physically impossible" (paras. 198, 200, and 203 of the Memorial).

312. Finland's flat rejection of the Sound as a navigational route for offshore units is unwarranted. As a starting point it should be emphasized that the Sound has been utilized for towing *Rauma-Repola* built semi-submersibles from the Baltic to the North Sea a number of times. Further, according to observations made by the Royal Danish Navy, at least one of the three identical drill ships built at *Rauma-Repola* has sailed through the Sound under its own power.

313. Denmark recognizes that the towage of an offshore unit through the part of the Sound known as the Drogden Channel, requires careful planning, preparation of extensive towing plans, use of local tugs and local pilots, as well as an absence of unfavourable climatic conditions. But the same would be true of passage via the less protected waters in the Great Belt, and, in fact, these considerations apply to any MODU transport irrespective of route, as offshore tows in general are only performed when weather conditions and other relevant factors are suitable.

314. Denmark also acknowledges that the guaranteed minimum depth of the Sound is merely half that of Route T through the Great Belt making the question of determining and securing the presence of the appropriate underkeel clearance acutely important. The lesser depth in the Sound may under unfavourable conditions necessitate temporarily stopping the MODU in the Sound before entering the short Drogden Channel, if the water level for one reason or another has fallen below mean sea level. But "waiting on weather" is a very common cause of interruption of offshore transports, especially once the transport leaves Danish waters and proceeds into open sea. And it should be borne in mind that with respect to towage of MODUs the only area with critical water depth

in the whole of the Sound is the Drogden Channel with its total length of 5.5 nautical miles.

315. It is therefore conceded that towing a MODU through the Sound may, due to the lesser water depth in a number of ways be more inconvenient than taking it through the Great Belt. But then again, inconvenience should not be equated with impossibility.

316. Denmark believes that subsequent to the completion of the East Bridge offshore structures should utilize the Sound as their principal route of passage through the Danish straits. Irrespective of whether Finland prevails on its claim that MODUs have a right of passage through the Danish straits, Denmark is entitled to make such a regulation under the rules of international law pertaining to the separation of traffic and establishment of traffic lanes for ships of special characteristics and, *a fortiori*, to MODUs. It would be open to Denmark, under customary international law and by analogy with the right conferred in Article 22 of the 1982 Convention on the Law of the Sea to issue regulations requiring that MODUs capable of transiting the Danish straits via the Drogden Channel should in the future do so. In order to justify such a regulation the Government of Denmark is not obliged to demonstrate that the Sound is in every respect as suitable for offshore transport as the Belt. It is submitted that Denmark merely has the burden of demonstrating, and substantiating, that the Sound is an adequate and feasible route for the transport of existing MODUs through the Baltic approaches, and that its regulation is justified by considerations of safety.

317. In order to avail itself of an expert opinion on the possibilities for towing MODUs through the Sound the Government of Denmark has commissioned London Offshore Consultants Ltd. to submit a report on that subject with particular emphasis on whether

the units built by *Rauma-Repola* could have been towed through the Sound (Annex 45)[49].

Requisite Underkeel Clearance for MODU Passage of the Sound

318. A basic premise for determining whether a MODU may be safely towed through the Sound is the establishment of the proper underkeel clearance. For this purpose it must be carefully analysed whether the underkeel clearance figure should include allowances for:

- variations in the sea level,
- variations in the draught of the MODU,
- variations in the level of the seabed.

319. It will be shown that variations of this sort are under normal circumstances minimal in the Sound, and that it is therefore not necessary to adjust the underkeel clearance to make allowances for these factors.

320. Factors influencing the sea level include wind, tide, air pressure, and fresh water drainage into the sea. The Sound is particularly well sheltered against wind-generated waves, the tide is negligible, and the variations in water level caused by air pressure changes are generally insignificant. Like fresh water drainage into the Baltic Sea, air pressure changes will usually lead only to a rise in the water level.

321. Although variations of the water level both above and below mean sea level will occur, such variations remain predictable and will thus not pose problems for passage through the Sound as

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[49] London Offshore Consultants Ltd. is a qualified Marine Insurance Surveyor, one of a very few firms world wide nominated by underwriters on insurance policies to approve marine operations which include the towage of MODUs. Underwriters do not become involved in the technicalities of towages, such as underkeel clearance, but rely on the experience of those such as London Offshore Consultants Ltd. to approve such operations.

towage of a MODU whether in the Sound, the Great Belt, or elsewhere in the world will not be undertaken if unfavourable climatic conditions are present or approaching.

322. The factors that may influence the draught of a MODU or a ship include accuracy of draught measurement, wave-induced vertical motion of the MODU, squat, and change in draught due to towline pull.

323. The precision of a draught reading depends on the smoothness of the surface of the sea. The draught of the unit may be accurately measured in sheltered waters. Such waters are available immediately prior to entering the Drogden Channel.

324. The basic premise of London Offshore Consultants' Report is that a towage through the Sound will only be executed in suitable environmental conditions. London Offshore Consultants conclude that such favourable weather conditions may be obtained in the Sound at any time of the year, and combined with the sheltered location of the dredged Drogden Channel this means that the vertical movements of the MODU will be negligible.

325. Squat is an increase in draught experienced when a vessel moves close to the sea bottom inducing a reduction in pressure. Since squat is insignificant to the point of absence at slow speeds, it may be disregarded for tows through the Drogden where the estimated speed will be only 2 knots. The towlines will be mounted to ensure that the pull of the tug will not affect the draught of the unit, at least not at the modest speed of towage.

326. Finally, the nature of the Drogden Channel does not make it necessary to include a dredging tolerance or a tolerance allowing for sedimentary deposits. The sea bed of the channel is stable chalk, and the currents prevent sandbank and other sedimentation build-up in the navigational route. Thus, the full reliability of the charted minimum depth of 7.7 metres in the dredged channel is ensured.

327. Against this background London Offshore Consultants conclude that a MODU may be safely towed through the Sound with a draught of up to 7.2 metres i.e., with an underkeel clearance of 0.5 metres. Since drill ships sail under their own power with normal navigating capability, the underkeel clearance of 0.5 metres recommended as safe and feasible by London Offshore Consultants only applies to towage of jack-up and semi-submersible drilling rigs.

328. It is important to note that only the Report submitted by London Offshore Consultants has squarely addressed the issue of the appropriate underkeel clearance for a controlled MODU towage through the Sound. The statements provided in Finland's Memorial on the question of underkeel clearance are either general in their character or relate to other - geographically incomparable - waters.

329. It is of particular interest to note that the Report submitted by Noble Denton Marine Services Ltd., Annex 32 to the Memorial, does not recommend a specific underkeel clearance for tows in the Drogden. Relying on such general statements as "(o)wners of MODUs like to see at least two metres of water below the keel or the lowest part of the unit"[50], no attempt is made to test this two-metre clearance against the particular conditions in the Drogden. A number of the factors mentioned in Annex 32 as determinative for a two-metre underkeel clearance are precisely those factors the influence of which has been demonstrated above to be negligible or non-existing for tows through the Drogden Channel. The application, in Annex 32 and in the Memorial in general, of a two-metre underkeel clearance for tows through the Sound is therefore not warranted, and, it is contended, cannot form the basis for a determination of whether the mobile offshore drilling units built by *Rauma-Repola* may be transported through the Sound.

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[50] Annex 32 to the Memorial, p. 146.

330. Finland has referred to the recommendation on underkeel clearance issued by the Permanent International Association of Navigation Congress (PIANC) (para. 75 of and Appendix 1 to Annex 4 to the Memorial). Finland contends that when applied to the Sound the PIANC recommendation leads to a required underkeel clearance of 0.9 metres. First, it should be noted that the recommendation notably applies to large ships, not MODUs. Secondly, the figure quoted by Finland is by nature general and does not take the particular merits of the individual case into account. Thirdly, the part of the recommendation relied on by Finland states that in channels "exposed to strong and long swell, gross underkeel clearance to be about 10 to 15 per cent. of the draught"[51]. The reference is not well chosen. Due to its location adjacent to the coasts of *Amager* and *Saltholm* and the sheltered nature of the Sound in general, the Drogden waters sustain not strong but only insignificant swell; swell being defined "as the wave motion caused by a meteorological disturbance, which persists after the disturbance has died down or moved away"[52]. Inexplicably, Finland has failed to include in its excerpt from the PIANC recommendation the provision in the document applicable to channels "less exposed to swell" (section 2.2.2.8.4.), which would of course be a much more relevant basis of comparison to the sheltered Drogden Channel. In such channels, the PIANC document recommends an underkeel clearance of 10 per cent. of the vessel's draught (Annex 46). As applied to the towage of an average jack-up with a transit draught of 5.50 metres, the PIANC recommendation would counsel a minimum underkeel clearance of 0.55 metres for passages through the Sound.

331. Finland has quoted *Det Norske Veritas* for recommending an underkeel clearance during towage of an offshore

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[51] Appendix 1 to Annex 4 to the Memorial, section 2.2.2.8.3.

[52] *The Mariner's Handbook*, NP 100, 6th ed., 1989, p. 62.

unit of minimum 5 metres (para. 75, section 6 of the Memorial[53]). Finland's application of this recommended underkeel figure to the towage of a MODU is inappropriate. The cited part of the Veritas document explicitly applies to "objects such as gravity base structures, jacket substructures, offshore towers, etc.". These units are not MODUs but fixed production platforms. A gravity base structure is a concrete production platform with a floating draught of up to 200 metres, which will be towed to its drilling site to be permanently installed there. Obviously, the underkeel clearance recommended for a fixed production platform of this type cannot be applied to the towage of a MODU with a towing draught of e.g., 6 metres. The inappropriateness of Finland's reliance on the recommendation regarding these fixed offshore structures is made clear by a statement submitted by *Det Norske Veritas* to the Government of Denmark (Annex 47).

332. London Offshore Consultants' recommendation of a minimum underkeel clearance for the passage of MODUs through the Sound of 0.5 metres is in accordance with the practice established by the Sound pilots. The pilots recommend an underkeel clearance of 0.5 metres for a controlled towage of a semi-submersible or a jack-up platform through the Drogden. The pilots consider the underkeel clearance of 0.2 metres established for regular ships applicable also to drill ships navigating through the Drogden. Drill ships are neither larger nor more restricted in their ability to manoeuvre than regular ships which pass through the Drogden with draughts up to 7.5 metres.

333. In further support of its contention of the viability of the Sound as a transit route for MODUs, the Government of Denmark has asked *Det Norske Veritas* to recommend the appropirate underkeel clearance for a controlled towage of a MODU through the Drogden Channel. Like London Offshore Consultants, *Det*

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[53] Veritas Marine Operations, *Standard for Insurance Warranty Surveys in Marine Operations*, June 1985, Section 5.8.2.1 (Apppendix 2 to Annex 4 to the Memorial).

Norske Veritas is one of a very few Marine Insurance Surveyors world wide that review plans for MODU tows on behalf of major underwriters. In their statement, *Det Norske Veritas* endorses the conclusion of London Offshore Consultants that an underkeel clearance of 0.5 metres for towing a MODU through the Drogden in good weather is fully adequate (Annex 48).

G. Transport of *Rauma-Repola's* MODUs through the Sound

334. It has now been established that semi-submersibles and jack-up platforms may be towed through the Drogden with an underkeel clearance of 0.5 metres, and that drill ships may sail through the Drogden with 0.2 metres of water underkeel, in both cases subject of course to normal environmental conditions. Thus at mean sea level platforms with draughts of up to 7.2 metres and drill ships with draughts of up to 7.5 metres may transit the Sound.

335. The draught figures established above will allow most existing MODUs in the world to transit through the Sound in a controlled operation. At the request of Denmark, London Offshore Consultants Ltd. has executed a case study on whether each of the MODUs hitherto built at *Rauma-Repola* may be towed through the Sound.

336. The conclusion of the study is that, with the exception of four semi-submersibles fitted with thrusters protruding beneath the hull of the MODU, all 22 MODUs listed in Table II as built by *Rauma-Repola* could be transported through the Sound without any technical modifications to the units. One of these four semi-submersibles does not have a drilling tower and could be towed under the East Bridge, whereas the remaining three units could be towed through the Sound after a temporary dismantling of their thrusters.

337. The findings of the *Rauma-Repola* study are summarized in the following. It is important to note that, as

previously mentioned, London Offshore Consultants Ltd. is a qualified Marine Insurance Surveyor, one of a very few firms worldwide approved by the insurers of marine operations to review plans for the towage of MODUs for purposes of taking out insurance policies covering such transports. Thus, when London Offshore Consultants conclude that, subject to the conditions of passage set out above, a *Rauma-Repola* semi-submersible or jack-up rig may safely be towed through the Sound provided there is at least a water column of 0.5 metres underkeel, it may *eo ipso* be assumed that such a tow would be insurable with major underwriters.

338. The draught of a MODU is a variable figure. The draught of a MODU when being towed is known as the transit draught. A jack-up rig will have two transit draughts, one for location moves and one for ocean towage. The transit draught of any MODU relates to a specific weight or displacement. If the weight or displacement of the unit is altered, so is the draught.

339. The weight of a MODU may be divided into two components: the light weight (a fixed weight consisting of the weight of the hull and the fixed equipment) and a variable load (a variable weight consisting of moveable weights carried on or within the hull). A significant part of the variable load is made up by drill pipes, drilling equipment, bulk storage, drilling mud, fuel, and water. These items are not normally supplied by the MODU builder, and are usually not delivered to the rig until it is in its drilling area. This part of the variable load would therefore not be included for a delivery transport from the yard to the drilling destination.

340. The transit draught for a unit quoted by MODU yards and the various offshore registers will, however, normally include the quantity of variable load needed for drilling purposes. Consequently, the actual draught of a MODU on its delivery voyage from the production yard will invariably be - or may easily be

reduced to - a draught which is considerably less than the listed transit draught of that particular MODU.

341. London Offshore Consultants Ltd. has examined the transit draught of all units produced by *Rauma-Repola* as listed by available offshore registers. For those designs whose transit draught was critical with respect to passing through the Drogden Channel, London Offshore Consultants have contacted the current operator of the rig and ascertained the precise quantity of variable load carried on the unit at its listed transit draught.

342. The availability of these data have made it possible to make an accurate evaluation of the possibility for passage through the Sound for each of the units produced at *Rauma-Repola*. The conclusions of the study demonstrate that out of the 22 MODUs built at *Rauma-Repola* 14 may be towed or sail through the Sound without any modifications to their design, carrying their maximum variable load. 4 semi-submersibles may be towed through the Drogden Channel without any modifications to their design if less than maximum variable load is carried, and three semi-submersibles may be towed through with their thrusters dismantled if less than maximum variable load is included. The last unit is not a drilling rig but a Multi-purpose Support Vessel; it cannot pass the Drogden but may go under the East Bridge as it has no drilling tower.

343. Finland has informed the Court that all semi-submersibles built by *Rauma-Repola* were towed through the Danish straits[54], including the four units equipped with thrusters. Two jack-ups were carried on heavy-lift ships, whereas one jack-up was towed in floating condition through the Danish straits. None of the semi-submersible or jack-up units produced by the Finnish yard were thus self-propelled during passage of the Danish straits. The drill ships, of course, sailed under their own power.

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[54] Picture 1 shown by the Agent of Finland, Ambassador Grönberg, to the Court on 4 July 1991.

344. In its rejection of the Sound as a viable route for the transport of offshore craft (paras. 198 - 206 of the Memorial) Finland fails to recognize the fact that a number of the offshore craft built by *Rauma-Repola* did in fact utilize the Sound for transiting the Danish waters. Danish authorities have three *Rauma-Repola* semi-submersible drilling rigs and at least one of the *Rauma-Repola* drill ships on record as passing through the Sound (RR 3, RR 4, RR 6, and RR 15).

345. Finland also declines to consider the possibility of towing jack-up platforms produced in Finland through the Sound, despite the fact that the floating transit draught of all *Rauma-Repola* jack-up rigs is comfortably less than the acceptable draught of 7.2 metres. Finland instead persistently advocates the carriage of jack-ups by heavy-lift vessels citing considerations of safety as well as insurance costs (paras. 200 - 201 of the Memorial). The fact remains that towage is by far the most common mode of transporting jack-ups, particularly in sheltered waters such as the Danish straits.

346. Finland's contention of the impracticability of towage through the Danish straits is further contradicted by the practices employed for transporting offshore units and equipment from *Rauma-Repola* to the North Sea. High value offshore equipment has in fact in a number of instances been towed or a barge rather than transported on heavy-lift ships through the Baltic approaches. In early 1991 *Rauma-Repola Offshore* delivered as a sub-contractor part of the structure for the Norwegian built *Snorre* production platform. Modules have also been carried on a barge and towed from Finland to Norway, demonstrating again that towage is a safe means of transport provided it is properly planned and executed. In addition, it should not be overlooked that one of the jack-ups co-produced by *Rauma-Repola* and the *Vyborg* Shipyard was towed through the Great Belt in August 1991 (illustration on page 60 of the Memorial). This unit had an actual towing draught of 6.5 metres which, like the other jack-ups built by *Rauma-Repola*, would have allowed it to pass through the Sound, see paragraph 348.

347. Finland has listed the MODUs produced at *Rauma-Repola* in Table 16 on page 86 - 87 of the Memorial. A number of the specification figures advanced by Finland merit comment and correction. Regarding the two jack-ups built by *Rauma-Repola*, Finland goes to the extent of listing the transit draughts of the two Gusto units (RR 22 and RR 23) as 10.3 metres and 8.5 metres, respectively. These figures are not, however, the transit draughts of the jack-up platforms, but the draught of the heavy-lift vessel with the jack-up loaded on deck. According to the operator of one of these rigs the floating draught of these two platforms is 6.35 metres (Annex 45), thus comfortably allowing them to be towed through the Sound. This draught corresponds with the transit draughts of the two jack-ups as listed in the offshore registers[55]. Table 16 fails to include an explanatory note indicating that the quoted draught of the jack-up was as carried on a heavy-lift ship. Table 16 also lists the draughts of a number of jack-up rigs which *Rauma-Repola* has tendered but not built. It may be assumed that these draught figures do not refer to the towing draught of these units but again to the draught of the heavy-lift ship carrying the jack-up. The draughts quoted by Finland for some of these tendered rigs are approximately twice the towing draught of the largest modern jack-up rigs in the world.

348. Table 16 of the Memorial also lists the two Minsudprom jack-ups built by *Rauma-Repola* in cooperation with the *Vyborg* Shipyard, Russia. According to information available to the Government of Denmark, only one of these, *Murmanskaya*, has been delivered from the yard in *Vyborg*, whereas the other platform is still under construction. Finland has submitted that the transit draught of both jack-up rigs was "over 8.0 metres" stating "(d)raught information as received from the yard" (p. 86 of the Memorial). This piece of information contrasts with the fact that when the jack-up *Murmanskaya* was towed through the Great Belt in August 1991 the pilots measured and recorded it to have an

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[55] *Guide to Mobile Drilling Units*, Oilfield Publications Limited, 1989.

actual draught of 6.5 metres. This draught would of course have allowed *Murmanskaya* to be transported through the Sound. It may therefore be concluded that despite the figures listed in Finland's Table 16 all jack-ups built by *Rauma-Repola* have towing draughts of 6.5 metres or less.

349. Further, the draught figures quoted by Finland in Table 16 for the six Aker H-3 semi-submersible rigs built by *Rauma-Repola* are puzzling. Finland states that the draught of these six units is 7.0 metres. The offshore registers consistently quote these rigs as having transit draughts between 6.1 and 6.7 metres. These latter figures accord with the draught readings executed by the Sound pilots when three of these *Rauma* rigs transited the Sound in the 1970s. Finland lists no source for the stated draught figures.

350. Also in Table 16, Finland has quoted the Multi-purpose Support Vessel (MSV) as having a water draught of 11.5 metres. This conflicts with the registered transit draught of the unit, which is 7.9 metres. It may be that this rig, *Stadive*, has subsequently been fitted with thrusters, but it should be noted that at least when the unit transited the Danish straits in December 1982, the operator reported to the Danish authorities that the semi-submersible had a draught of 8.5 metres. As mentioned in paragraph 342 this craft may pass under the East Bridge as it has no drilling tower.

351. As a final point it should be pointed out that there is a discrepancy between the information given by Finland in Table 16 and in paragraph 262 of the Memorial as to the number of offshore rigs built by *Rauma-Repola*. In paragraph 262 the number of offshore rigs delivered by *Rauma-Repola* since 1972 is quoted as 23, whereas Table 16 only lists 21 deliveries. In *Rauma-Repola's* sales folder (Annex 51 to the Memorial) pictures are shown of 7 Aker H-3 and 4 Friede & Goldman semi-submersibles against only

6 Aker H-3's and 3 Friede & Goldman rigs in Table 16. No explanation is given for this discrepancy.[56]

352. Table II lists all MODUs produced at *Rauma-Repola*. The list includes the transit draught of each unit, given either on the basis of information available in various offshore registers, as stated by the operator of the rig, or as measured by Danish pilots during passage.

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[56] In this Counter-Memorial Denmark has *inter alia* on the basis of *Rauma Repola's* sales folder (Annex 51 to the Memorial) assumed that *Rauma Repola's* production totals 22 rigs. Denmark considers that only three jack-up rigs have been completed, as the fourth jack-up counted by Finland, a Finnish/Russian co-production, has not yet been delivered from the shipyard in *Vyborg* according to information available to Denmark.

TABLE II Mobile Offshore Drilling Units Built at Rauma-Repola

YARD NUMBER	*NAME OF RIG*	*YEAR OF DELIVERY*	*DESIGN*	*TRANSIT DRAUGHT*
DRILL SHIPS				
RR 15	VALENTIN SHASHIN	1981	GUSTO	7.3[1]
RR 16	VIKTOR MURAVLENKO	1982	GUSTO	7.3
RR 17	MICHAIL MIRCHINK	1982	GUSTO	7.3
JACK-UPS				
RR 22	KOLSKAYA	1985	GUSTO	6.4[2]
RR 23	SAKHALINSKAYA	1985	GUSTO	6.4[2]
-	MURMANSKAYA	1991	-	6.5[3]
SEMI-SUB-MERSIBLES				
RR 1	PENTAGONE 84	1974	PENTAGONE	7.3[4]
RR 2	SONAT DF 96	1975	PENTAGONE	7.3[4]
RR 3	DUNDEE EXPLORER	1975	AKER H-3	6.5[3]
RR 4	KINGSNORTH EXPLORER	1976	AKER H-3	6.0[3]
RR 5	OCEAN BENLOYAL	1976	AKER H-3	6.1
RR 6	PETROBRAS VII	1977	AKER H-3	6.4[6]
RR 7	SONAT DF 97	1977	PENTAGONE	7.3[4]
RR 8	MEXICO III	1978	AKER H-3	6.5
RR 9	TREASURE FINDER	1977	AKER H-3	6.4
RR 10	BORGNY DOLPHIN	1977	AKER H-3	6.7
RR 12	WEST DELTA	1980	OCEAN RANGER	7.3
RR 14	CASPMORNEFT	1978	FRIEDE & GOLDMANN	5.8
RR 18	STADIVE	1982	-	8.0[5]
RR 19	GLOMAR ARCTIC I	1983	FRIEDE & GOLDMANN	7.5
RR 20	MAERSK HIGHLANDER	1984	FRIEDE & GOLDMANN	7.5
RR 21	GLOMAR ARCTIC III	1984	FRIEDE & GOLDMANN	7.5

Note 1. All draught figures taken from Lloyd's Register books unless where otherwise indicated.

Note 2. Draught taken from the *Guide to Mobile Drilling Units*, Oilfield Publications Ltd., 1989.

Note 3. Draught as measured by Danish pilot prior to passage.

Note 4. Hull draught excluding thrusters.

Note 5. This Multi-purpose Support Vessel has no derrick, and could pass under the East Bridge.

Note 6. Draught taken from Annex 45.

353. London Offshore Consultants Ltd. has concluded that 19 out of the 22 drilling rigs built by *Rauma-Repola* could pass through the Sound (or the Great Belt after construction of the East Bridge) without any modification to the design of the units. A few of these units cannot go through the Sound with full variable load. As stated above most of this variable load is usually not delivered, and is in any event not required until the rig is in its area of drilling (paras. 339).

354. Only three semi-submersibles would, due to their draught-increasing thrusters, have to undergo a temporary modification in order to pass the Danish straits. One possibility would be to dismantle the thrusters, or - considering that the thrusters are not needed for propulsion during transit as all *Rauma* semi-submersibles have been towed through Danish waters - not to fit the thrusters until after passage of the Sound. Another possibility would be to dismantle the top part of the derrick to allow passage under the East Bridge and refit the derrick part afterwards. The methods of modification and the costs involved will be addressed in the following Chapter.

H. The Fixed Link across the Sound

355. In a treaty signed on 23 March 1991 the Governments of Denmark and Sweden agreed on the construction of a fixed link between the two countries. The treaty has subsequently been ratified by the two parliaments, in Denmark through the passing of Act No. 590 on the Public Works for a Fixed Link across the Sound dated 19 August 1991.

356. The link will span a strait where a series of car ferries, train ferries, passenger hydrofoils, and cargo ships ply between the coasts of Denmark and Sweden. In 1991 there were approximately 162,000 ferry departures across the Sound carrying around 21 million passengers including a fair number of daily commuters, 2.7 million cars and trucks, and 6 million tonnes of goods.

357. The fixed link will be combining a four-lane motorway and a two-track railway connection. The link, which will have a length of around 18 kilometres, will originate from *Kastrup* Airport, near Copenhagen, and make contact with the Swedish mainland by *Limhamn*, near *Malmö*.

358. The link will cross three navigational routes; the Drogden, the Flinte, and the Trindel channels. The most important of these routes is clearly the Drogden which accounts for 87 per cent. of all navigation through the Sound[57]. With its minimum water depth of 7.7 metres the Drogden also handles the largest and the heaviest ships.

359. The fixed link will cross the Drogden Channel by tunnel as the proximity to the runways of the international airport at *Kastrup* for reasons of safety necessarily excludes the notion of a high-level bridge starting near the airport. The 1.8 kilometres long immersed tunnel will surface at a small artificial islet to the south-west of the island of *Saltholm*. The immersed tunnel will traverse the Drogden at a depth sufficient to maintain the possibility of later dredging the Drogden to a minimum depth of 10.0 metres. The siting of the tunnel will obviously be of no consequence to existing navigation through the Drogden.

360. From the artificial islet off *Saltholm* the motorway and the railway will mount a low-level bridge with an elevation of 7 metres. The bridge will then turn into a high-level bridge with an elevation of approximately 50 metres in order to cross the Flinte Channel. The horizontal clearanc of the transit lanes through the Flinte Channel will be at least 300 metres.

361. A consortium formed by the Danish and the Swedish States through two state-owned, public, limited companies has been charged with planning, owning, and operating the fixed link across

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[57] Report from MSR Consultants: *Analyser af skibstrafikken i Øresund*, January 1991.

the Sound. The budgeted construction costs for the fixed link are approximately DKK 17,000 million (USD 2,650 million), which will be financed exclusively through toll fees to be levied on the cars and the national railway companies utilizing the link.

362. Following an international tender procedure it is expected that construction works will commence in 1993, and the road and rail connections are expected to open in 1999.

363. In support of its argument that the Sound is not a relevant alternative for the Great Belt as an international passage for large ships, and, impliedly, for offshore units, Finland has stated that it is unclear whether the conditions of the Sound can be maintained if the proposed fixed link between Denmark and Sweden is built (para. 94 of the Memorial).

364. Finland's conclusion is puzzling. In its section on the proposed fixed link across the Sound (paras. 85-93), the accuracy of which Denmark can fully endorse, there is no basis for Finland's contention. On the contrary, it is clearly stated that the immersed tunnel will leave existing navigational traffic through the Drogden unaffected and even allow for a future dredging of the Drogden down to a depth of 10.0 metres. It is understood, though, that any future dredging of the Drogden Channel would have to be in conformity with established environmental standards.

CHAPTER VII.

MODIFICATION OF SEMI-SUBMERSIBLE AND JACK-UP DRILLING UNITS

A. Introduction

365. The traffic of mobile offshore drilling rigs through the Danish straits can basically be divided into two categories; northbound delivery voyages from MODU building yards located in the Baltic, and transits made by rigs with exploration assignments on drilling sites in the Baltic. The former is by far the more numerous.

366. While it has been shown that 19 out of the 22 MODUs produced at *Rauma-Repola* could have gone either through the Sound or the Great Belt after completion of the East Bridge without any technical modification of the design of the rig, three semi-submersibles fitted with thrusters would have had to be modified to pass through one of the Danish straits. The type of modification applicable to these three semi-submersibles, and possibly other offshore units which might not be able to transit through the Danish straits without technical alterations, depends on which strait is to be employed for passage, the Sound with its limited water depth and its absence of height constraints, or the Great Belt which allows a deeper draught and a maximum air draught of the unit of 65 metres.

367. Contrary to what may be inferred from Finland's description of the offshore activity in the Baltic (paras. 299 - 323 of the Memorial) offshore exploration for hydrocarbons in the Baltic has been very modest. Judging from the information that has been released on the results of the various exploratory drills in the Baltic Sea, there is no basis for expecting that the Baltic will become a major or even an important area for offshore hydrocarbon production.

368. At any rate, the East Bridge will not close off the Baltic to incoming MODUs. As demonstrated above, most drill ships, jack-ups, and semi-submersibles in the world may without technical modifications go through the Sound. The few rigs that due to their deep draught would not be able to pass through the Sound are harsh environment rigs which would not be necessary to use in the Baltic. The weather conditions in the Baltic are much less severe than e.g., the open sea environment of the North Sea offshore industry. Consequently, the Baltic offshore activities do not require the very large, deep-draught harsh-environment platforms often utilized in the North Sea. According to the findings of Lloyd's Register all drill ships, about two thirds of all semi-submersibles and all modern jack-ups may be transported through the Sound without any technical modifications (Annex 35). It may therefore be safely assumed that the Baltic offshore exploratory activities will in the future be adequately serviced by the MODUs that are capable of passing through the Sound. No technical rationale or need for bringing in MODUs with deeper draughts can be demonstrated.

369. Most competitive rigs on the market will thus be able to transit the Danish straits, the future East Bridge notwithstanding. However, the possibility that an operator would want to bring into the Baltic one of the very few MODUs that due to excessive draught cannot pass the Drogden Channel e.g., a large deep-draught harsh-environment semi-submersible, a semi-submersible with thrusters, or an old jack-up with non-retractable spud cans protruding beneath the hull and increasing the draught, cannot, of course, be altogether ruled out. In this case it would be necessary to modify the rig temporarily to allow it to pass the Danish straits in one of the three manners outlined below in sections B, C, and D. The Government of Denmark submits, however, that irrespective of whether MODUs enjoy a right of passage through the Danish straits, Denmark is not obliged under international law to design the Great Belt Link to accommodate such a theoretical future development.

370. Of more interest are *Rauma-Repola's* possibilities for towing possible future orders for offshore rigs from the Baltic to the North Sea. Using the existing productions from the Finnish yard as basis for an evaluations of the possibilities, the problems facing the Finnish yard do not seem insurmountable. Only three out of twenty-two rigs would need temporarily to be modified to reenter the Baltic Sea. It is by no means certain that future rigs will have deeper draughts than existing ones. In fact the largest and most modern jack-up rigs in the world all have towing draughts well below 7 metres. The trend of jack-ups in recent years has been towards a reduction rather than an increase of the draughts of the rigs, partly due to the retractability of spud cans on modern units, partly due to the fact that deep draught may eliminate the possibility of using heavy-lift transport. The draughts of the drill ships are not expected to change. Semi-submers-ible units tend to be built larger than before. For very many of the semi-submersible rigs, however, this increase in size has not led to an increase in the draught of the rig.

371. Still, should it become necessary to modify a future *Rauma-Repola* unit with critical draught and air draught in order to facilitate passage through the Danish straits, three different methods are available, depending on the type of unit and the strait to be employed for passage. The three methods that have been examined in the following sections are; the removal of the thrusters of a semi-submersible to reduce draught and enable passage through the Sound (section B), the removal and subsequent assembly of the top part of a derrick on a semi-submersible to reduce air draught and permit passage under the East Bridge (section C), and subsequent installation of the top sections of the legs of a jack-up to reduce the air draught and allow passage under the East Bridge (section D).

372. Denmark has commissioned London Offshore Consultants to identify what would be the most feasible technical procedure for each modification method, and in particular, to estimate the time to be spent and the costs to be incurred in connection with these modifying measures. In order to make the

estimates realistic, London Offshore Consultants have solicited estimates from contractors and offshore yards in Sweden and Norway experienced in the type of work in question. The estimate from the yards indicate the expected duration of the job as well as the inherent expenses and are appendixed to Annex 45. Thus, optimum reliability of the time and cost estimates included in Annex 45 is ensured.

373. In their cost estimates London Offshore Consultants have assumed that the semi-submersible rig is completed and commissioned in Finland, then modified (thrusters dismantled or top of derrick taken off), whereas the jack-up hull and a section of the legs will be fitted in Finland with the top sections of the legs left unassembled. The semi-submersible or the jack-up is then towed through the Danish straits to a yard in Sweden, Norway, or the United Kingdom for final assembly. Whether it is necessary to complete assembly of the semi-submersible at *Rauma-Repola* only to modify it again, or whether it would not be faster and more inexpensive not to complete assembly until after passage through the Baltic approaches is arguable. The more conservative method adopted by London Offshore in their calculations ensures, however, that the cost estimates are based on a worst-case scenario.

374. The cost estimates in Annex 45 are comprehensive and include the costs of the modification measures themselves (supported by estimates from contractors), maintenance of rig crew, port fees, mobilization, demobilization and hire of tug/crane/barge where applicable, demobilization of crew, insurance, project management, and allowance for contingencies. Where the quotations from the yards and contractors vary, the highest figures rather than the lowest quotations obtained have been used by London Offshore Consultants in the preparation of the estimates. The estimates include neither the time nor the expense of towing the unit from *Rauma-Repola* through the Danish straits as this transportation cost would have had to be incurred irrespective of modification.

375. Finland has presented cost estimates pertaining to each of the relevant methods of modification in Annexes 37, 39, and 55 to the Memorial. When comparing Finland's estimates with those made by London Offshore Consultants on the basis of actual quotations it seems evident that no attempt has been made on the part of Finland to identify designs or procedures that minimise the costs and time for the work. To name just one example, in its estimate Finland has apparently considered it necessary to remove not just the top part but the entire derrick to allow passage under the East Bridge, thereby, unnecessarily, increasing the time and costs of the modification vastly.

B. Removal of Thrusters

376. Thrusters are sometimes fitted on a semi-submersible. Thrusters may serve one or both of two purposes, namely to give the unit propulsion for independent navigation and to provide the unit with dynamic positioning ability during drilling operations. The thrusters are installed under the platform, protruding up to 3 or 4 metres beneath the underside of the hull itself. The draught of the unit would thus be reduced very considerably if the thrusters were temporarily removed.

377. Thrusters are by their very nature dismountable. Sometimes older semi-submersibles are furnished with thrusters years after their completion. In many instances the thrusters, even on new semi-submersibles, are not fitted at the place where the rig itself is constructed. This is due to the limited water depth of many MODU yards, which cannot accommodate the draught of a semi-submersible with thrusters. Instead, the platform is completed at the yard, and then towed to a deep-water site where the propulsion system is mounted. Subsequent mounting of thrusters is thus a routine part of rig construction at many yards.

378. Finland has conceded that it is technically feasible to tow a semi-submersible without thrusters through the Sound for

subsequent mounting (para. 292 of the Memorial). Indeed, Finland has informed the Court that also the semi-submersibles fitted with thrusters were towed on their delivery voyages from the Baltic through the Danish straits[58]. The only arguments advanced by Finland against these modifying measures are the costs and the loss of time involved in dismantling and reinstalling the thrusters. It is important to note that when looking only at hull draught of the unit (without thrusters) London Offshore Consultants have concluded that all semi-submersible drilling rigs hitherto built by *Rauma-Repola*, whether they be of the Aker, the Pentagon, the Ocean Ranger, or the Friede & Goldman type, may be towed through the Sound without altering the design of the unit. It is not until thrusters are mounted that draught becomes a problem for passage through the Drogden Channel.

379. Invariably, the removal and refitting of thrusters will take time and involve costs. Thrusters are not constructed by the yard but delivered to the yard by a specialized manufacturer. One of these manufacturers, KaMeWa, estimates that thrusters of KaMeWa design may be dismantled in half a day per thruster (Appendix C to Annex 45). At the request of London Offshore Consultants *Gotaverkan* in Gothenburg, Sweden, has quoted time and costs for dismantling the thrusters of a semi-submersible drilling rig and fitting them on the rig again. In this quotation, it has been assumed that the number of thrusters to be dismantled was four. On the basis of this quotation, the total costs of this modifying operation have been estimated by London Offshore Consultants to USD 757,500. This figure does not include an allowance for the interest on the extension of the time of delivery.

380. Finland's calculation of the extra costs for delivery of semi-submersibles due to removal of thrusters cannot be accepted (Annex 55 to the Memorial). Finland has contended that this modification job will cost *Rauma-Repola* USD 1,398,730 (FIM

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[58] Picture 1 shown by Finland's Agent Mr Grönberg to the Court on 4 July 1991.

10,833,333), excluding again the time-interest factor. As demonstrated by the quotation referred to above, the dismantling of the thrusters and the refitting is much less time-consuming and particularly less costly than indicated in the Finnish calculations.

381. Further, Finland's calculation of the time interest factor is inflated. The following remarks on Finland's method for calculating the interest on the extension of the delivery time are general in nature and thus also apply to Finland's calculations for modification of the derrick of a semi-submersible (Annex 37 to the Memorial) and for modification of the legs of a jack-up (Annex 39 to the Memorial).

382. In the three cost calculations made by Finland, the interest on the extended delivery time account for between 42 and 62 per cent. of the total costs of modifying the rig to permit passage (Annexes 55, 37, and 39 to the Memorial). Calculation of the time interest depends on four factors; time spent, total purchase sum for rig, outstanding payments on the rig at the time of delivery, and the interest rate employed.

383. In the first place, less time than assumed by Finland is needed for the actual modification works, and, as noted above, the transportation time from Finland through the Danish straits cannot reasonably be said to constitute a delay and should therefore not be included. Secondly, Finland states the price of a semi-submersible at USD 200 million. The average cost of the semi-submersible drilling rigs currently under construction in the world is not USD 200 million but USD 90 million[59]. Thirdly, Finland's calculation presupposes that a MODU is paid cash on delivery with no down payment or instalments paid prior to delivery. This would be a highly unusual payment plan. A much more common procedure on the offshore market would be that a total of 80 per cent. of the purchase sum is paid in instalments prior to completion of the rig,

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[59] Offshore Data Services: *Chronology of Offshore Mobile Drilling Rigs 1949-present*, January 28, 1992, Table 6.

and a final 20 per cent. instalment would be paid at delivery. Finally, the interest figure of 13 per cent. employed by Finland is disputed by Denmark. Finland offers no explanation for the choice of an interest rate of 13 per cent. While reserving its position with respect to the correct rate of interest to be employed, Denmark has, in order to facilitate comparison, chosen to make use of the figure of 13 per cent. in the following calculations.

384. According to a calculation of the interest on the extended delivery time in relation to the removal of thrusters based on, it is submitted, more realistic premises would then amount to: 13 per cent. on USD 16 million (20 per cent. of USD 90 million) for 18 days (including an allowance for unforeseen contingencies), or USD 104,000 as opposed to Finland's USD 2.7 million (FIM 10.8 million).

C. Removal of the Top Part of the Drilling Derrick

385. In the unlikely event that the draught of a semi-submersible drilling rig cannot be reduced to the maximum permissible draught in the Drogden, and the rig is to be towed under the East Bridge, part of the drilling tower or derrick of the unit would have to be left unassembled until after passage through the Great Belt. According to the conclusions in Annex 45, none of the units produced at *Rauma-Repola* would have had to undergo this modification as they may all be towed through the Sound (three of them only after dismantling of thrusters, however). Modification of the derrick is therefore an operation to be performed only on a possible future unit with an unusually deep draught.

386. In such a case, a primary objective would be to take off as little as possible of the derrick to minimise the time and cost needed to execute the final assembly away from the yard. To reduce the air draught of the semi-submersible as much as possible during passage, the rig would be ballasted down to the maximum permissible draught during passage of the bridge. Semi-submersibles

often have operating draughts in excess of 25 metres, and it is perfectly feasible to tow the semi-submersible for a short distance ballasted to or almost to its operating draught. The water in the navigational route through the Great Belt is relatively deep. Map V shows that in an area stretching from at least 10 nautical miles south to at least 10 nautical miles north of the siting of the East Bridge the water depth in the navigational route is constantly in excess of 25 metres. This water depth will permit ballasting the semi-submersible to a draught of at least 23 metres during passage of the bridge thus minimising the part of the derrick to be taken off.

387. How much of the derrick could be completed at the yard, and how much would have to be fitted subsequent to passage will be determined by the air draught of the unit when ballasted to a draught of e.g., 23 metres. The derrick height must be reduced sufficiently to give the semi-submersible an air draught of no more than 65 m when floating with a draught of 23 metres. At this draught the semi-submersible drilling rigs built by *Rauma-Repola* would have air draughts ranging between 74 and 97 metres. Thus, for the lowest semi-submersible rig only the top 9 metres of the derrick would have to be taken off and fitted afterwards to enable the unit to pass under the bridge. For the tallest *Rauma-Repola* semi-submersible rig the derrick would have to be reduced by 22 metres. As the height of a derrick is approximately 50 metres, it is clear that, in any case, less than half of the derrick will have to be taken off and refitted after passage of the Great Belt. This conclusion also holds true for the semi-submersibles that *Rauma-Repola Offshore*, according to Table 16 on page 86 - 87 of the Memorial, has tendered although not built in the period 1984 - 1991 as far as can be seen from the air draught figures listed by Finland in Table 16.

388. The cost and time required for the dismantling and refitting of the top of the derrick would be significantly less than calculated by Finland in Annex 37. London Offshore Consultants have made a cost estimate based on the premise that the rig and derrick will be completed and commissioned in Finland.

Subsequently, the top part of the derrick will be lifted off in one piece and put upright on the rig for transport through the Great Belt. Instead of using the older, and more simple type of derrick installed on the semi-submersibles hitherto built in Finland, the cost estimates have been based on the taller and more complicated derricks with top mounted motion compensators now used on most modern semi-submersible rigs. The rig would then be towed to e.g Gothenburg in Sweden or Stavanger in Norway where crane capacity is available for lifting the top of the derrick onto the rig in one section.

389. For purposes of the cost estimate, quotations have been solicited from experienced yards and operators of crane vessels etc in Sweden and Norway (appendixed to Annex 45). On the basis of time estimates and budgetary prices submitted by these contractors, London Offshore Consultants have compiled a comprehensive cost calculation according to which taking off the top part of the derrick, securing it on the rig, and lifting it back and installing it finally on the rig will take a total of 24 days and run to a total expense of approximately USD 2,380,000 (including a sizable allowance for contingencies both in terms of time needed and costs, but excluding possible consequential costs from the extension of the delivery time).

390. The Finnish calculation of extra costs flowing from subsequent assembly of a derrick in Annex 37 is exaggerated in a number of respects. From the amount of time allotted to the disassembly and reassembly of the derrick (four months), it is clear that Finland presupposes that the whole derrick is to be dismantled. This is an infinitely more complicated and time-consuming task than the one proposed by Denmark[60]. What is more, the method

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[60] Finland has submitted a statement from the reputed rig designers Friede & Goldman Ltd. on the estimated duration of disassembly and reassembly of a fully outfitted drilling derrick on a MODU (Annex 41 to the Memorial). Similar to Finland's own time and cost calculations, Friede & Goldman's estimate of a total work time of 5 - 7 weeks is based on the assumption that the whole derrick will have to be dismantled and reinstalled.

presupposed by Finland is completely unnecessary as it is only necessary to take off as much of the derrick to give the rig it an air draught of 65 metres during passage under the East Bridge. The method proposed in Annex 45 is simply to lift off the top part of the derrick with the aid of a floating crane, leaving at least the lower half of the derrick with its hydraulic, electrical, and mechanical systems intact. Leaving these systems unaffected also means that *Rauma-Repola* may run its test drills on this equipment in Finland. The tests to be conducted on the rig subsequent to final assembly of the derrick will be very limited and will involve only the small amount of equipment directly affected by the dismantling and reinstallation of the derrick. Presumably, it is such extensive - and superfluous - test runs that have led Finland to estimate that the refitting of the derrick will take ten weeks rather than the two weeks estimated by the yards.

391. Finland's estimate of the extension of the delivery period to four months as opposed to the total of 24 days estimated, by London Offshore Consultants on basis of the estimates from the yards also leads to excessive budget figures for crew salary and expenses, maintenance of rig operation during reassembly of derrick, insurance, and other time-related components of the cost estimate. All in all, Finland has estimated the total costs of the modification job to USD 6,057,236 (FIM 23,017,500) against London Offshore Consultants' quotation-based estimate of USD 2,380,000 (both figures exclude interest on the extension of time of delivery).

392. Denmark again disputes Finland's calculation of the interest on the extension of the time of delivery as unreasonable. Denmark's arguments against Finland's method of calculation are of course parallel to the ones advanced in paragraphs 381 - 383 on removal of the thrusters of a semi-submersible. The calculations should thus be based on a rig price of USD 90 million with a final payment of 20 per cent. of the total purchase sum outstanding at the time of delivery, and most importantly of an extension of the delivery time of only 24 days as opposed to Finland's suggestion of

four months. The interest factor would then amount to: 13 per cent. of USD 16 million for 24 days = USD 138,666. The total costs of the modification may then be estimated to USD 2,518,666 which compares with Finland's calculation of the total costs to USD 14,724,000.

D. Reduction of the Leg Length of a Jack-Up Rig

393. All jack-ups produced at *Rauma-Repola*, and most other jack-ups in the world, particularly all modern units, have draughts that would allow them to be towed through the Sound without any type of modification or even adjustment of the variable load carried on the rig (Annex 35 and Annex 45) The moulded draught of a jack-up (the distance from the water line to the underside of the jack-up hull) is usually less than 6 metres. On some older jack-ups the extremities of the legs, the spud cans, protrude below the hull increasing the draught of the platform. All new jack-ups, however, are built with retractable spud cans that do not add to the draught. It is therefore extremely unlikely that future jack-ups will experience draught problems if towed through the Sound, and modifications will therefore not be necessary.

394. Should it become necessary for one reason or another to tow a jack-up under the East Bridge it will be necessary to leave part of the legs of the jack-up unassembled until after passage of the bridge. The air draughts of jack-ups in transit condition vary between 130-170 metres. It will thus be necessary to fit at least half and often more than half of the leg sections of the rig north of the bridge.

395. Jack-up legs are normally welded together in sections, and neither the procedure of taking off the legs and refitting them later nor the procedure of completing the construction of the jack-up hull in one place and installing the legs in another is an unprecedented undertaking.

396. Section of the legs of particularly very tall jack-ups are sometimes removed for long inter-continental transports. In the case of towage of jack-ups this is done to increase the stability of the unit, reduce the risks of capsizing and for strength reasons. The leg sections are then carried either on the deck of the unit or on accompanying barges. When a jack-up with very long legs is transported, the legs are subject to strong inertia forces which may in some cases cause damage to the joints in the steel construction.

397. A fair number of MODU yards, some of them among the largest and most successful in the world, are located on rivers behind fixed bridges or other permanent height constraints with critical clearances. These yards will complete construction of the hull and the legs, and then tow these separately past the height constraints for final assembly at another location. The situations faced by these yards is addressed in some detail in paragraphs 403 - 410. Suffice it here to say that one of these yards, Marathon Le Tourneau, in fact the biggest producer of jack-ups in the world, has to tow the unassembled unit down the Mississippi River for more than 350 nautical miles past more than 20 overhead constraints to have the legs of the rig installed at another yard. This distance is not very different from that between Finland and the Sound, and it is worth noting that the maximum free clearance to which this yard has had to conform is more than 20 metres lower than the clearance of the East Bridge.

398. Finally, a number of oil exploration and exploitation sites are located behind fixed bridges necessitating the temporary removal of most of the leg length of incoming and outgoing jack-ups. The most important of these offshore hydrocarbon fields behind fixed height constraints would probably be Lake Maracaibo in Venezuela. As of May 1992 a total of 38 mobile offshore drilling rigs are at work in Lake Maracaibo[61]. Jack-ups entering or leaving

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[61] *Offshore Rig Locator*, Vol. 19, No. 5, May 1, 1992.

the area will have to pass the Maracaibo Bridge with its free vertical clearance of 45 metres.

399. Thus, although the reduction of the leg length of a jack-up is not expected to become necessary to pass through the Danish straits where the Sound will be a perfectly viable route for a wet tow transport, this procedure is well-known in the offshore world. London Offshore Consultants have proposed that the jack-up hull be completed and part of the legs installed at *Rauma-Repola* up to an air draught of no more than 65 metres in wet tow. The remaining part of the legs are built in Finland and towed on a barge to a sheltered deep-water site e.g., in Norway where the remainder of the leg sections will be installed. This may require an adjustment of the method of building jack-up legs at *Rauma-Repola*, but the method that *Rauma-Repola* may be required to adopt is a conventional and acceptable method of building jack-up legs.

400. On the basis of a quotation from the HMV yard in Norway and the Ugland crane vessel operator also in Norway a comprehensive time and cost estimate has been compiled in Annex 45. As there will not be any dismantling of the unit at *Rauma-Repola's* yard in Finland, the only delay in delivery will be the time needed to fit the legs after passage of the bridge. This period has been estimated by the yard to 20 working days, although London Offshore Consultants have, allowing for various contingencies, allotted 49 days to complete the assembly. Based on the various quotations the total price for the subsequent installation of the leg sections has been assessed at USD 3,741,200. This contrasts with Finland's calculation of the same job for a duration of three months and at an estimated cost of USD 6,146,236.

401. Denmark again differs from Finland on the calculation of the time-interest factor. Finland again assumes the price of the rig to be USD 200 million. The average price of the jack-up rigs under construction as of 28 January 1992 was USD 79.6 million, and Denmark submits that in order to make a reliable calculation it

would be more reasonable to employ this figure[62]. For purposes of illustration it may be noted that the construction costs of a Coral Design jack-up currently under construction in *Vyborg*, presumably the *Rauma-Repola/Vyborg* co-production, are USD 67 million[63].

402. Thus, the interest on the extension of the delivery time in case of modification of a jack-up calculated according to the principles outlined in paragraphs 381 - 383 totals: 13 per cent. on USD 15.92 million (20 per cent. on USD 79.6 million) for 49 days, or USD 277,836. The total cost of the modification of a jack-up carried out according to the procedure proposed by Denmark will be USD 4,019,036 vis-à-vis Finland's calculation of a total of USD 10,696,237.

E. MODU Building Yards Located behind Fixed Bridges or other Permanent Height Constraints

403. A significant number of MODU building yards in the world are situated on rivers or in river deltas with permanent height constraints in the form of fixed bridges or aerial cables between the yard and the sea. In all instances the maximum free clearances of the height restrictions encountered by the yard are around 50 metres or lower.

404. It has consequently been an integral part of the production routine of these yards to complete assembly of their rigs at a site other than the construction facility. The distances between the production site and the site where the final assembly and the commissioning procedure are executed vary from 20 to 350 nautical miles. In some cases the completion of the legs of a jack-up or the

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[62] Offshore Data Services, *Chronology of Offshore Mobile Drilling Rigs 1949-present*, January 28, 1992, Table 6.

[63] *Offshore Rig Locator*, Vol. 19, No 5, May 1, 1992.

derrick is carried out at a yard that does not belong to the builder of the MODU (e.g., Annex 54 to the Memorial).

405. These upriver MODU yards, and there are at least 9 such yards located behind height constraints, produce jack-ups, semi-submersibles, drill ships, submersibles and drilling barges. It is certainly not correct when Finland asserts that "cases of known disassembly concern only lightweight structures, do not involve harsh environment, heavy jack-ups or semisubmersibles" (para. 208 of the Memorial). In fact, the three largest producers of MODUs in the world in the past 20 years, Marathon Le Tourneau (Vicksburg, Mississippi) Bethlehem Steel Corp. (Beaumont, Texas) and Levingston Shipbuilding Co. (Orange, Texas) are all located with permanent height constrictions between their place of production and the sea. These three yards have principally built jack-ups but also semi-submersibles and drill ships for use all over the world, including in harsh environments, and they alone account for 143 out the 603 semi-submersibles, jack-ups, and drill ships currently in existence. All of these 143 MODUs were built in one place and then towed to another for final fitting of the top sections of the legs or the top of the derrick.

406. The usual procedure adopted by these yards is to complete construction of the jack-up with the maximum leg length and derrick height permitted by the height constraints and complete construction of the drill ships and the semi-submersibles with as much of the derrick as allowed by the bridges etc. The remainder of the leg sections and the top of the derrick are then assembled once the units have been towed past the height restrictions to reach the open sea (Annex 54 to the Memorial). It is precisely this well-tested method that Denmark would expect *Rauma-Repola* to employ, should it - in the future - prove necessary to modify the height of *Rauma-Repola's* rigs. The only difference is that it will not be necessary to take as much off the leg sections of a *Rauma-Repola* jack-up due to the fact that the clearance of the East Bridge is much higher than the height constraints encountered by the three above-

mentioned American yards on the Mississippi, the Sabine, and the Neches Rivers and by Scottish MODU yards on the Clyde River.

407. These MODU yards behind bridges or aerial crossings etc naturally take the relevant height constraints into consideration in the design of the rig to facilitate completing the rig in stages (Annex 54 to the Memorial). It has not been demonstrated why *Rauma-Repola* could not do the same, if need be.

408. Finland argues that to complete erection of the derrick or the legs subsequent to passage of the East Bridge "would be totally unfeasible" and that "the builder would automatically be disqualified from the competition due to extra costs and extended delivery time" (paras. 287 - 88 of the Memorial). Finland's argument is untenable. Marathon Le Tourneau, Bethlehem Steel Corp., and Levingston Shipbuilding Co. have grown to be among the biggest producers of jack-ups in the world despite the fact that all MODUs produced at these yards had to be towed for distances of up to 350 nautical miles under a number of bridges and aerial crossings with free clearances of less than 50 metres.

409. Similarly untenable is Finland's argument that if a requirement for subsequent fitting of the legs of a jack-up "were for some reason imposed on (*Rauma-Repola*) alone the company could be disqualified from the competition" (para. 291 of the Memorial). But *Rauma-Repola* would not be the only yard. As demonstrated, at least 9 other MODU yards are faced with height constraints in their production process, but unlike *Rauma-Repola* these yards may not avail themselves of an alternative passageway free of height constraints (for MODUs with draughts not exceeding 7.2 metres) nor of a passageway with a free clearance of 65 metres.

410. Out of the 603 semi-submersibles, jack-ups, and drill ships currently in existence, more than one fourth or 180 of the units have been built at yards which have had to tow their rigs past fixed height constraints with clearances significantly below that of the future East Bridge to reach the sea, see Annex 49.

CHAPTER VIII.

THE PASSAGE OF CRANE VESSELS THROUGH THE GREAT BELT AND THE SOUND

411. A crane vessel is a floating unit with one or more permanently installed cranes capable of carrying out lifting assignments at sea. It does not have drilling capability, and, although primarily used in the offshore business, crane vessels cannot, strictly speaking, be characterized as offshore vessels. Large crane vessels are employed during the transport, installation, operation, and repair of offshore units.

412. Crane vessels include a wide range of very different units, from regular ships to offshore-type semi-submersibles. In this Counter-Memorial the term crane vessel is employed as a common denominator for four distinct types of units:

a) Crane barges
b) Mono-hulls (regular ships) fitted with cranes
c) Catamaran vessels (twin-hulls) fitted with cranes
d) Semi-submersible crane vessels.

413. Lloyd's Register has reviewed the specifications of the 295 registered crane vessels in existence, in particular with regard to air draught, draught and lifting capacity (Annex 35). The great majority of the crane vessels are smaller barges or crane ships with limited lifting capacity. When it comes to lifts in excess of 1,000 tonnes, only the 15 largest cranes in the world can be employed. Such lifts can be carried out by the largest mono-hulls and catamaran vessels, whereas the heaviest lifts may only be executed by semi-submersible crane vessels. During transport most crane barges are towed by tugs, mono-hulls and catamaran vessels sail under their own propulsion, while semi-submersible crane vessels are usually furnished with some means of propulsion and may in some instances be fully self-propelled.

414. The air draughts of the large crane vessels are quite high, but out of the 295 crane vessels in existence today, all but four vessels can pass either through the Sound or under the future East Bridge without any technical modification to the vessels' design.

415. As with any other vessel the air draught of a crane vessel depends on its draught. All crane vessels are capable of being ballasted to a draught significantly deeper than their transit draughts in order to obtain sufficient stability during the execution of their lifting assignments. The variation in draught, and thereby in air draught, is particularly significant for semi-submersibles; to name just one example, *Hermod*, one of the largest semi-submersible crane vessels in the world, has a transit draught of 11.5 metres and a maximum operating draught of 28.2 metres.

416. When determining whether the existing crane vessels may be able to pass under the future East Bridge, the air draught of the vessel at transit draught is not decisive as the water depth in the Great Belt permits the vessel to be ballasted to a much deeper draught. As mentioned in paragraph 386, Map V demonstrates that the water depth in the Great Belt, in an area from at least 10 nautical miles south of the East Bridge to at least 10 nautical miles north of the bridge, is constantly more than 25 metres. While allowing for a sizable underkeel clearance this will enable the large semi-submersibles to ballast down to a draught of at least 23 metres during passage of the East Bridge. The largest mono-hull crane vessels may ballast down to their maximum operational draughts, which range between 8 and 10 metres. Ballasting down to the deepest possible draught is of course normal operational procedure for a crane vessel when it carries out its lifting assignments.

417. In Annex 35 Lloyd's Register has listed the air draughts of the world's largest semi-submersible crane vessels at a draught of 23 metres and the world's largest catamaran and mono-hull crane vessels at their operational draughts. These figures show that out of the 295 crane vessels on the market only three semi-submersibles and one mono-hull crane vessel will not be able to pass under the future East Bridge with its vertical clearance of 65 metres or through the Sound with its minimum water depth of 7.7 metres.

418. The Finnish yard *Wärtsilä*, now *Kværner Masa*-Yards Ltd., has built one of the largest crane ships in the world, *Stanislav Yudin*, see illustration page 85 of the Memorial. With its air draught of 62.6 metres, Stanislav Yudin may sail under the East Bridge even at transit draught, and the craft has a draught that has allowed it to pass through the Sound in the past. One of the largest semi-submersible crane vessels, *McDermott DB 101*, has a transit draught of only 7.5 metres and could, if it ever had to enter the Baltic, be towed through the Sound.

419. It is important to note that according to information available to Denmark, the very few crane vessels that will not be able to go under the East Bridge (unless temporarily modified) were neither built nor have they ever operated in the Baltic. Nor can any need for their presence in the Baltic be demonstrated. The Baltic will be adequately serviced by the 291 crane vessels that can pass either under the East Bridge or through the Sound. The largest of these crane vessels, the semi-submersible *Balder* ensure the availability in the Baltic of a single-vessel lifting capacity of up to 8,100 tonnes. To identify the need for a lifting capacity of this magnitude in the Baltic is, however, very difficult.

420. Finland's contention that the East Bridge will exclude large crane vessels from the Baltic is thus plainly wrong. Similarly untenable is Finland's argument that the exclusion of the large crane vessels might prevent the carrying out of a salvage operation of e.g., a nuclear powered submarine weighing more than 4,000 tonnes (para. 230 of the Memorial). Firstly, crane vessels with

lifting capabilities of more than double the figure mentioned by Finland may navigate the Great Belt also after construction of the Fixed Link. Secondly, heavy lifting assignments may be carried out by several smaller crane vessels working jointly rather than one large unit. This is in fact often done due to the high mobilization costs of the very large crane vessels and the higher degree of local availability of smaller crane vessels.

421. Thus, the East Bridge will not prevent even very large crane vessels from being taken into the Baltic should the need for assistance from these very large units arise in the future. Even more relevant, however, is the fact that the Fixed Link will leave the existing traffic of crane vessels through the Danish straits completely unaffected. None of the crane vessels which have been built or which have previously had lifting assignments in the Baltic will be prevented from making passages through the Danish straits in the years to come.

CHAPTER IX.

THE EFFECT OF THE GREAT BELT PROJECT ON THE BUILDING OF OFFSHORE UNITS IN FINLAND AND ON OFFSHORE OIL AND GAS ACTIVITIES IN THE BALTIC SEA

A. Effects on the Building of Offshore Units

422. In the Memorial (paras. 264 - 269) Finland gives an account of the investment made at the *Rauma-Repola Offshore* shipyard and at the Tahkoluoto harbour of the City of Pori. Finland claims that in the period 1983 - 1985 investments totalling USD 46.1 million have been made to enable *Rauma-Repola Offshore Oy* to compete on the offshore market.

423. Finland has argued that the lack of orders at the Finnish shipbuilding industry for offshore units is attributable to the Great Belt Project[64]. It is deplorable that the Government of Finland will introduce allegations of this nature in proceedings before the International Court of Justice.

424. According to Table 17 of the Memorial (p. 88) in the six years following the completion of the investments claimed to have been undertaken in 1983 - 1985 to enable *Rauma-Repola Offshore Oy* to compete on the offshore market, one MODU was delivered from *Rauma-Repola Offshore Oy*[65]. Within the same

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[64] Request for the Indication of Provisional Measures, para. 12, and statement by counsel of Finland, Sir Ian Sinclair, 1 July 1991.

[65] The MODU stated by Finland to have been delivered by *Rauma-Repola Offshore Oy* in 1991 was actually delivered by the *Vyborg* Shipyard, Russia, but built in cooperation with *Rauma-Repola Offshore Oy*. It was the jack-up *Murmanskaya*, which was towed through the Great Belt on its delivery voyage in August 1991 with an actual draught of 6.5 metres. This draught would also have allowed it to go through the Sound see para. 327.

time period shipyards outside Finland delivered 34 MODUs, see Table 17 on page 88 of the Memorial.

425. According to the information given in Table 16, *Rauma-Repola Offshore Oy* has in the period from 1984 - 1991 unsuccessfully tendered 6 semi-submersibles including one floating production vessel and in the period from 1988 to 1991 unsuccessfully tendered 10 jack-ups. Finland has failed to demonstrate that the lack of success of *Rauma-Repola Offshore Oy* has in any way been caused by the Great Belt Project. In so far orders for the rigs tendered by *Rauma-Repola Offshore Oy* have been placed at other yards, the reason has to be found in *Rauma-Repola Offshore Oy's* lack of ability to compete, not in the Great Belt Project[66].

426. The depressed situation of the Finnish offshore shipbuilding industry is of course also affected by the general economics of the oil market. Since the mid 1980s, the rig building industry have been in a state of recession. In the second half of the 1980s the offshore yards only delivered 43 MODUs, whereas the period 1980 - 84 saw 319 new deliveries.

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[66] The 1991 Annual Report from *Repola* Corporation, the parent company of *Rauma Repola Offshore Oy*, plainly states that "(d)emand for the products of *Rauma-Repola Offshore Oy* failed to pick up during the year, and major workforce reductions were necessary."

427. The outlook for the offshore contract drilling industry remains bleak[67]. Major oil companies have announced substantial cuts in their exploratory expenditures for 1992[68].

428. The market for mobile offshore rigs have showed a steadily falling trend over the past years with no indications of a change in the near future. The number of units is decreasing as older rigs are removed from the market without being replaced. Still, supply far exceeds demand. Supply and demand from January 1988 - May 1992 for jack-ups and semi-submersibles are shown on Tables III - IV.

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[67] An editorial comment in *Offshore Rig Newsletter* describes the market situation in the following way: "Let's face it, the offshore contract drilling industry is in a mess. ... In better times (and this is part of the current problem), new rig orders were so commonplace as to become almost non-events. Today, an order for any rig, regardless of size or design, is noteworthy (*Offshore Rig Newsletter*, Vol. 18, No. 11, November 1991 (Offshore Data Services, Houston, Texas)).

[68] See *Offshore Rig Newsletter*, Vol. 18, No. 11, November 1991 (Offshore Data Services, Houston, Texas).

TABLE III

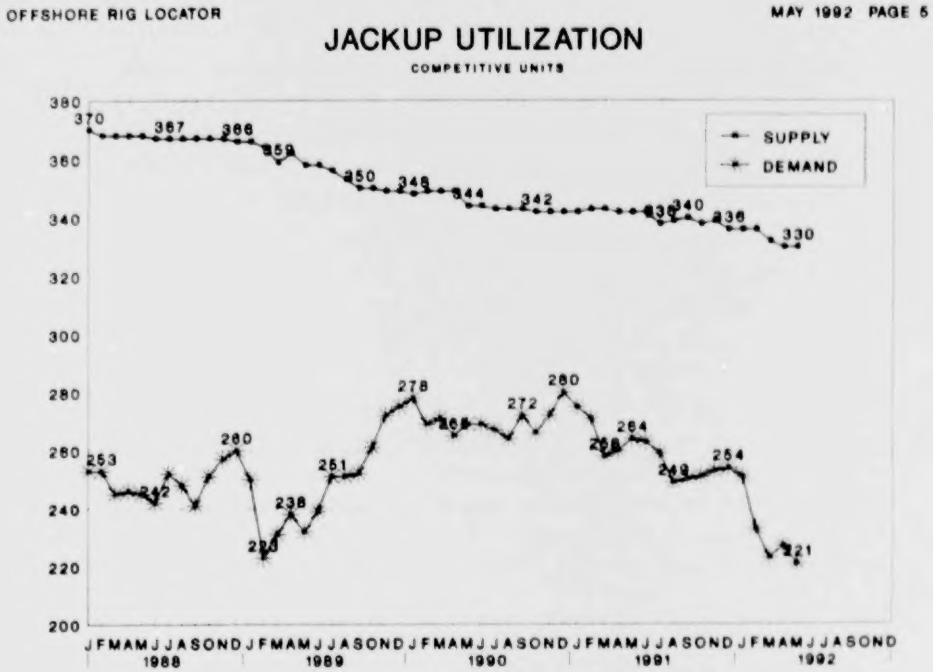

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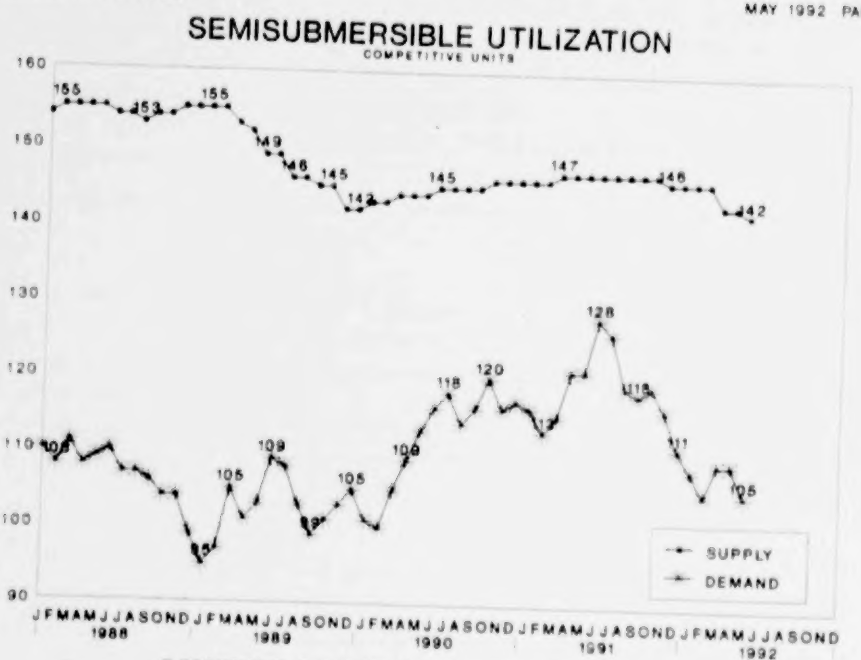
TABLE IV

OFFSHORE RIG LOCATOR

MAY 1992 PAGE 6



SEMISUBMERSIBLE UTILIZATION

COMPETITIVE UNITS

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429. The reduced demand for mobile offshore drilling units has depressed the rates. Day rates for hiring the largest type of jack-ups employed in the North Sea have dropped from USD 52 - 65,000 in the beginning of 1991 to USD 28 - 39,000 in the beginning of 1992. Day rates for the largest semi-submersibles employed in the North Sea dropped from USD 40 - 60,000 to USD 32 - 43,500. Similar decreases have hit other types of jack-ups and semisubmersibles employed in the North Sea. Day rates for offshore rigs working in the Gulf of Mexico, Southeast Asia and West Africa have seen equivalent decreases[69].

430. The surplus capacity of rigs on the offshore market has caused a sharp decline in orders for new offshore rigs.

431. Against this background, it is difficult to see the validity in the Finnish point of view that the Great Belt Project have had an adverse impact on Finnish shipyards' orders for MODUs. As for the future, reference is made to Chapter VI - VII of Part I, where it is explained to what extent the Great Belt Project has any impact on the transport of MODUs through the Danish straits.

B. The Effects on Offshore Oil and Gas Activities

432. Finland claims that the Great Belt Project adversely will affect the conditions for offshore oil exploration in the Baltic Sea. Based on the assumption that the Great Belt Project in its present form will separate the Baltic Sea from other offshore exploration areas, a picture is painted of the oil industry being subjected to the exploitation of "a monopolistic contractor" dominating the Baltic Sea (para. 323 of the Memorial)[70].

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[69] *Offshore Rig Locator* Vol. 19 No. 1 January 2, 1992, Offshore Data Services, Houston, Texas.

[70] According to Finland the Baltic Sea contains a substantial oil and gas potential. Publicly available seismic data do not, however, support the Finnish presentation of the Baltic Sea as an area with a high oil and gas potential.

433. The Finnish assumption is wrong. All existing drill ships, almost all, at least modern, jack-ups and most semi-submersibles can pass through the Sound without any technical modifications, see Annex 35. These many hundred rigs are of course operated by a multitude of rig owners, and the economic competition for exploration work in the Baltic Sea will be similar to the competition in other parts of the world. The Finnish notion of "a monopolistic contractor" in the Baltic Sea has no place in reality.

434. Finland has recently tried to rally support within the oil industry for its attempt to stop the Great Belt Project in its present form. The Government of Denmark has learnt that the Government of Finland has approached a major oil company with offshore interests in the Baltic area asking the company to support Finland in its allegations that the Great Belt Project would be an obstacle to future oil and gas exploration and exploitation in the Baltic. Despite persistent endeavours from the Finnish Government the oil company declined.

CHAPTER X.

THE GREAT BELT PROJECT AND OTHER BRIDGES AND TUNNELS IN THE WORLD

A. The Similarity between the Great Belt Bridge and other Bridges across International Straits

435. Finland claims that the Great Belt Bridge is unique as it is alleged to be the "only obstruction" across a territorial sea constituting part of an international strait (paras. 324 - 326 of the Memorial).

436. First, it should be recalled that the Great Belt Bridge is not an obstruction to international navigation. All existing ships using the Great Belt will continue to be able to go through the Great Belt in the future, see paragraphs 195 - 203. The two sailing ships that have been identified as being unable to pass under the East Bridge have never plied the Great Belt. As all sailing ships in the world, these two vessels have draughts that allow them to pass through the Sound. As for MODUs, all rigs built by Finnish shipyards, save three, can pass the Danish straits without any modifications, and the remaining units can pass subject to relatively moderate modifications. Do these facts warrant the use of the words "an obstacle - a definite obstruction"[illegible]? The fact remains that international shipping is not going to be hampered by the Great Belt Bridge.

437. Finland's description of the Great Belt Bridge as being unique because of "crucial differences" between the planned Great Belt Bridge and all other existing bridges in the world begs a question of law. Finland argues as if a relevant distinction can be drawn between international straits through internal waters and international straits through territorial waters. The distinction

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[illegible] Para. 330 of the Memorial.

alleged by Finland is clearly not a valid one, especially not when applied to the passage régime in the Danish straits.

438. Principally, the right of passage through the Danish straits is governed by the 1857 Treaty for the Redemption of the Sound Dues. Without going into the details of the Treaty, which will be addressed in paragraphs 661 - 682, suffice it here to mention that under the Treaty, Denmark has taken upon itself the obligation to let merchant ships pass unhampered through the Danish straits. This right of passage obviously exists irrespective of the legal status of the waters in the strait. The right of passage cannot be rendered obsolete through Denmark's unilateral actions e.g., by a pronouncement that a particular part of one of the Danish straits shall no longer be territorial sea but rather internal waters, notwithstanding the justification of such a step under international law. Thus, there is no difference in law between the right of passage through the Great Belt where the navigational route traverses only territorial sea (and high seas), the main navigational route through the Sound which also passes through internal Danish waters near Copenhagen, and the Little Belt which in its entirety is internal waters.

439. But the same result would follow if the right of passage through the Danish straits were governed exclusively by general international law. Article 16, paragraph 4 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone provides that there shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State. The right of innocent passage through international straits laid down in this provision does not distinguish between an international strait constituted by internal waters and an international strait constituted by territorial waters.

440. The fallacious nature of the Finnish distinction is further illustrated by the rules governing the coastal State's right to draw

straight baselines thereby converting territorial seas to internal waters. Coastal States have the freedom, within recognised limits set by international law, to draw straight baselines. Whether or not a coastal State has exercised its discretion to draw straight baselines with the effect of enclosing as internal waters areas which had previously been considered part of the territorial sea or the high seas cannot be decisive for the extent, let alone the existence, of the right of innocent passage through an international strait. The same principle applies in the event the establishment of a straight baseline has the effect of enclosing as internal waters areas which previously had been considered part of the territorial sea or the high seas. In such cases the right of innocent passage will continue to apply to those waters, see paragraph 2 of Article 5 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone.

441. Ordinance No. 437 of 21 December 1966 on the Delimitation of the Territorial Sea delimits the Little Belt and the Copenhagen Road area with the Drogden Channel as internal waters (Annex 50). In accordance with international law Article 3 of the Ordinance provides that this delimitation of areas as internal waters shall not entail any restriction in the existing right of passage for foreign ships through the parts of the internal waters of the Little Belt and the Sound which are normally used for such passage.

442. It is submitted that the distinction between internal waters and territorial sea has no bearing on the right of passage through an international strait. Therefore, the fact that the East

Bridge will cross an international strait constituted partly by territorial sea does not make the Great Belt Project unique[illegible].

B. Various Types of International Waterways

443. An *international strait* is one such type of waterway. Certain geographical, jurisdictional and functional criteria must be fulfilled in order for a waterway legally to constitute an international strait. Thus, in legal terms a waterway can be classified as an international strait when the following elements are present. The waterway in question must be a natural waterway between land masses connecting one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone or the territorial sea of a foreign State. Secondly, the waterway must be under the navigational jurisdiction of the coastal State or States concerned, i.e., it must be covered by the territorial sea(s) or internal waters of the State or States concerned. Thirdly, the waterway must be used for international navigation.

444. A *canal* is another type of waterway. An inter oceanic canal is an artificial internal waterway connecting one part of the high seas or an exclusive economic zone with another part of the high seas or an exclusive economic zone. Due to the artificial nature of a canal, in principle canals are to be distinguished in international law from natural waterways such as straits. In the

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[illegible] In support of the view that the Sound is not a feasible route Finland argues that Drogden is Danish internal waters (paras. 82 - 84 of the Memorial). As demonstrated above this is not a valid argument. Although the Drogden Channel today lies within Danish internal waters, the right of innocent passage continues to apply because the Drogden Channel is part of an international strait, which in its entirety is subject to a régime of innocent passage under the rules of the 1857 Treaty of Copenhagen as well as the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone. The right of passage through the main navigational route through the Sound, and thereby through the Drogden, is indeed derived from international law not merely from "local custom" as wrongly alleged by Finland in the Memorial (para. 84).

absence of express treaty provisions, it cannot be assumed that international law imposes restrictions upon a State in virtue of its own creative act in providing a new navigational connection.

445. However, the State in question can by treaty or by unilateral declaration accept the establishment of an international régime for an artificial internal waterway such as a canal. Consequently, when such a régime gives free access and unimpeded navigation to ships of all nations, the legal status of a canal can be compared with the legal status of an international strait, and bridges over such canals then become of interest to the present case.

446. Bridges across *entrances to major ports served by international shipping* and bridges across *waterways used for international navigation* will also be dealt with, as international shipping is concerned more with trade and transport than with the legal régime governing the different waterways. What counts from the point of view of merchant vessels are the actual conditions around the world for navigation including entering and leaving ports.

C. Bridges across International Straits

1. THE BRIDGES ACROSS THE LITTLE BELT

447. The first bridge ever erected across an international strait was the Little Belt Bridge in 1935 with a vertical clearance of 33 metres (Figure 14). The Government of Denmark considered this bridge to be in accordance with international law, and no protests were conveyed to Denmark as a result of the construction of the bridge.

448. In 1970 another bridge with a height of 42 metres was erected across the Little Belt.

2. THE BRIDGES ACROSS THE BOSPHORUS STRAIT

449. The Strait of the Dardanelles joins the Mediterranean Sea to the Sea of Marmara, and the Strait of the Bosphorus joins the latter to the Black Sea. The straits are connecting two parts of the high seas, and they are both frequented by international shipping.

450. The Bosphorus Strait somewhat resembles a river in being narrow with abrupt and angular windings and a strong current. The length of the Bosphorus Strait is approximately 17 nautical miles. At the narrowest point the strait is 0.5 nautical miles wide, and it has a minimum depth of 36 metres in the navigation channel. The Bosphorus Strait is indisputably an international strait. A status unaffected by the fact that the strait is internal waters enclosed by straight baselines (paras. 437 - 442).

451. The passage régime in the Turkish straits (the Bosphorus and the Dardanelles) has been regulated by several conventions, the most recent one being the Montreux Convention of 1936. This Convention provides for complete freedom of transit and navigation for merchant vessels of all nations in time of peace and war, subject only to taxes, charges, and sanitary measures authorised by the Convention, and to the right of Turkey to refuse passage to merchant vessels of States at war with Turkey. As for warships, in time of peace a limitation is placed only on the number and tonnage of vessels of non-Black-Sea Powers. Vessels of Black-Sea Powers are not subject to limitations placed on the tonnage if the vessel concerned pass through the straits singly, escorted by not more than two destroyers. In time of war, if Turkey is not a belligerent, warships enjoy complete freedom of transit and navigation through the straits only subject to the above-mentioned limitations. If Turkey is a belligerent, the passage of warships shall be left entirely to the discretion of the Government of Turkey.

452. Considering that the Montreux Convention provides for complete freedom of passage for merchant vessels of all nations in

time of peace, it is noteworthy that bridges have been erected over the Bosphorus Strait.

453. In 1973 the first bridge - the Bosphorus Bridge - was erected across the Bosphorus Strait. The bridge has been constructed as a suspension bridge with a vertical clearance of 64 metres. The bridge has a total length of 1,470 metres containing a main span of 1,074 metres. The bridge carries a six-lane highway and two sidewalks.

454. In 1988 another bridge - also with a vertical clearance of 64 metres - was constructed across the Bosphorus Strait 5.5 kilometres north of the previous bridge. The second Bosphorus bridge, named the Fatih Sultan Mehmet Bridge, has a main span of 1,090 metres and carries an eight-lane motorway and two sidewalks (Figure 15).

455. The Bosphorus bridges have to be passed by all ships to and from the Black Sea, which is today surrounded by seven States: Bulgaria, Rumania, Moldavia, Ukraine, Russia, Georgia, and Turkey.

456. The Rumanian Ministry of Industry has in a recent letter to the Danish Embassy in Bucharest explained that the Rumanian Shipyard *Galati* since 1976 has delivered drilling platforms of the jack-up type for offshore drilling use in the Black Sea. The letter further explained that there would be no difficulty for such a type of platform to pass under the Bosphorus bridges as the legs of the platforms are made of parts that can be welded after passage under the bridges (Annex 51).

3. THE PROPOSED BRIDGE ACROSS THE STRAIT OF MESSINA

457. The Strait of Messina separates the Italian island of Sicily on the west from the Italian mainland on the east, and joins the high seas of the Tyrrhenian Sea, northward, to those of the

Ionian Sea, southward. The length of the strait and its approaches is approximately 27 nautical miles, and it has a minimum depth of 71 metres in the navigation channel. The strait, which lies within the territorial sea of Italy, is at the narrowest point approximately 1.6 nautical miles wide.

458. Connecting two parts of the high seas and being used for international navigation, the Strait of Messina is an international strait.

459. In 1988 the Government of Italy informed the Sub-Committee on Safety of Navigation of the International Maritime Organization (IMO) on a project for the construction of a single or double span bridge across the Strait of Messina (Annex 52).

460. In a report to the Maritime Safety Committee the Sub-Committee noted that the minimum clearances foreseen for either of the proposed bridges "... would be not less than 64 metres in the central span of 1,400 metres for the single span and 500 metres for the double span proposed." The Sub-Committee was of the opinion that "... these minimum clearances should be more than adequate for ships likely to use the Strait of Messina, so far as can be foreseen" (Annex 53). In May 1989, the Maritime Safety Committee in a report endorsed the Sub-Committee's opinion on the navigational aspects of proposals to construct a bridge across the Strait of Messina (Annex 54).

461. Information from the *Stretto di Messina S.p.A.* - the state-owned company which has been granted a concession of undertaking preliminary investigations, planning, construction and operation of a fixed link across the strait - shows that the alternative project for a submerged bridge across the Strait of Messina has been abandoned for technical reasons. The final bridge design, *Progetto di Massima Definitivo*, which is expected to be submitted to the Italian Parliament for approval, provides for a single span suspension bridge with a vertical clearance of 64 metres, a total length of 3,660 metres, and a main span of 3,300 metres (Figure 16).

462. It is thus not correct when Finland asserts that the alternative of an underwater bridge at a depth of 30 metres is being actively considered (para. 426 of the Memorial).

D. Bridges across Canals open to International Ship Traffic

1. THE BRIDGES ACROSS THE KIEL CANAL

463. The German Kiel Canal is approximately 53 nautical miles long and connects the Baltic Sea with the North Sea. It was constructed during the period 1887 - 1895 and has a width of 162 metres and a depth of 11 metres.

464. The fact that a total of 13 bridges - all with a vertical clearance of 42 metres - have been erected over the Kiel Canal has not prevented this navigational route from being the most important connection in terms of number of ships between the North Sea and the Baltic Sea[73]. The Kiel Canal bridges have been constructed between 1894 and 1989.

465. During the period 1919 - 1936, the Kiel Canal was governed by the Peace Treaty of Versailles. Article 380 of the Treaty is of special interest:

> "*Art. 380*: The Kiel Canal and its approaches shall be maintained free and open to the vessels of commerce and of war of all nations at peace with Germany on terms of entire equality."

466. In 1923 the status of the Kiel Canal came before the Permanent Court of International Justice in the *Wimbledon* case. The Court by a majority, in giving judgement against Germany,

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[73] In 1988 a total number of 34,300 vessels passed through the Kiel Canal. The same year 17,900 vessels passed through the Great Belt.

held that the Canal had been internationalized by the Treaty of Versailles as the Court in its judgement said:

> "... that the terms of Article 380 are categorical and give rise to no doubt. It follows that the canal has ceased to be an internal and national navigable waterway, the use of which by the vessels of states other than the riparian state is left entirely to the discretion of that state, and that it has become an international waterway intended to provide under treaty guarantee easier access to the Baltic for the benefit of all nations of the world. Under its new régime, the Kiel Canal must be open, on a footing of equality, to all vessels, without making any distinction between war vessels and vessels of commerce, but on one express condition, namely, that these vessels must belong to nations at peace with Germany.", see *P.C.I.J. 1923 Series A, No.1*, p.22.

2. The Bridges across the Panama Canal

467. The Panama Canal, which opened to traffic in 1914, is approximately 44 nautical miles long, has a width that varies between 70 - 300 metres, and a minimum depth of 12.4 metres. The Panama Canal ranks as one of the most important artificial waterways in the world.

468. In 1942 and 1962 two bridges were erected across the Panama Canal.

469. During the period 1901 - 1977, the passage régime in the Panama Canal was governed by the Hay-Pauncefote Treaty between the United States and Great Britain, signed 18 November 1901, and the Hay-Varilla Treaty between the United States and the Republic of Panama, signed 18 november 1903. Both Treaties provide for a canal that, when constructed, shall be neutral in perpetuity, and free and open to vessels of commerce and of war of all nations, on terms of entire equality.

470. The status of the Panama Canal was discussed in the *Wimbledon* case in which the Permanent Court of International Justice referred to the Suez and Panama Canals as precedents which were:

> "merely illustrations of the general opinion according to which when an artificial waterway connecting two open seas has been permanently dedicated to the use of the whole world, such waterway is assimilated to natural straits in the sense that even the passage of a belligerent man-of-war does not compromise the neutrality of the sovereign State under whose jurisdiction the waters in question lie.", see *P.C.I.J. 1923 Series A, No.1*, p. 28.

471. In spite of the fact that the Panama Canal according to the Treaties mentioned above is free and open to passage of vessels of all nations, bridges have been erected across the Canal.

472. In 1942 the first bridge - the Miraflores Bridge - was erected across the Panama Canal. The bridge was constructed as a swing bridge.

473. In 1962 another bridge - the Thatcher Ferry Bridge - was erected as a fixed arch bridge across the Panama Canal. No protests from other States were conveyed to the Government of Panama as a result of the construction of a bridge with a vertical clearance of 60 metres, a total length of 1,650 metres, and a main span of 344 metres.

474. It must be assumed that the Government of Panama - when deciding to build a fixed bridge across the Panama Canal - held the view that the bridge did not violate its treaty obligation to ensure free and open passage of vessels of all nations. No legal controversy surrounded the Government's decision to build a fixed bridge with a vertical clearance of 60 metres, presumably because the bridge was not considered to be an impediment to free passage through the Canal.

E. Bridges across Entrances to Major Ports Served by International Shipping and across Waterways Used for International Navigation

1. BRIDGES ACROSS ENTRANCES TO MAJOR PORTS SERVED BY INTERNATIONAL SHIPPING

475. As illustrated below, bridges across entrances to important ports in the world are not an uncommon feature.

Bridges:	Vertical clearances:
Verrazano Narrows Bridge, New York	66 metres
Golden Gate Bridge, San Francisco	67 metres
San Francisco-Oakland Bay Bridge, San Francisco	65 metres
Lions Gate Bridge, Vancouver	60 metres
Tagus River Bridge, Lisbon (due to local topography)	70 metres
Maracaibo Bridge, Venezuela	45 meters
Guanabara Bridge, Rio de Janeiro	63 metres
Sidney Harbour Bridge, Sidney	52 metres
Alvsborg Bridge, Gothenburg	45 metres
Yokohama Bay Bridge, Yokohama	55 metres

476. International shipping calls extensively on these major ports notwithstanding the height restrictions set by the above-mentioned bridges.

477. As stated in paragraph 211 - 221, the vertical clearances of some of these bridges will, due to the importance of the ports in question, operate as primary design parameters with respect to the air draught of future ships.

478. The bridges listed above and the Japanese bridges mentioned below further serve to illustrate that international shipping has, apparently quite successfully judging from the

importance of the ports concerned, been able to trade on ports with bridges whose clearances are similar to, or even significantly below, the clearance of the East Bridge.

2. BRIDGES ACROSS WATERWAYS USED FOR INTERNATIONAL NAVIGATION

479. The Kanmon Strait - one of the waterways connecting the Japan Sea with the Pacific Ocean - is the strait between the main island of Japan, Honshu, and the island Kyushu. At the narrowest point the strait is only a few hundred metres wide, and it has a minimum depth of 13 metres in the navigation channel. The Kanmon Strait is intensively frequented by international shipping calling on major Japanese ports in the Seto Naikai (Seto Inland Sea)[74].

480. In 1958 a highway tunnel was constructed under the Kanmon Strait. As a result of increasing traffic, studies were begun in 1962 on the possibility of erecting a bridge across the strait. Formal approval for the construction of a bridge was given by the Minister of Construction in April 1968. In 1973 the bridge was completed as a suspension bridge with a vertical clearance of 61 metres. The bridge has a total length of 1,068 metres containing six lanes and a main span of 712 metres (Figure 20).

481. The Seto Naikai is the inland sea between the Japanese islands Honshu and Shikoku. The Seto Naikai is intensively used for international navigation, especially to and from the ports of Osaka, Kobe, and Hiroshima. A total of 18 bridges are to connect Honshu and Shikoku across the Seto Naikai. One of these, the Bisan Seto Bridge, is shown on Figure 21.

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[74] As to the history of the Kanmon Strait see Erik Brüel, *International Straits*, p. 104 - 105 (London, 1947).

482. Twelve of these bridges have already been completed. The remaining six, currently under construction, will be completed in 1998 - 1999. One of these, the Akashi Kaikyo Bridge, will be the longest suspension bridge in the world when completed.

483. In the main navigational routes the bridges have been or will be constructed with vertical clearances of 65 metres and main spans of more than 800 metres.

484. It is interesting to note that the number of ships passing under the Seto Naikai bridges each year is about ten times larger than the number of ships passing through the Great Belt. The height restrictions in the Seto Naikai have thus not hampered international navigation.

F. The Tendency in Bridge Construction

485. From the examples mentioned above it appears that the vertical clearances of bridges across major waterways used by international shipping vary between 42 and 70 metres, and that the clearances concentrate around 60 - 65 metres. This also applies to future bridges that are designed or currently under construction. A graphical illustration of this is given below. The examples illustrate that the vertical clearance of the East Bridge is in accordance not only with the height of other bridges across waterways with a legal status similar to that of the Great Belt but also with other bridges that are of comparable importance to international navigation.

486. As demonstrated in Figure 22, no tendency in bridge construction towards increasing the vertical clearance of bridges across waterways important for international navigation can be ascertained. This corresponds with the fact that there has not been any increase in the air draughts of the largest vessels in recent years. In fact, the tallest passenger vessels ever built were delivered in the 1930s, and subsequent generations of very large cruise ships have been somewhat lower (para. 212 and Annex 37).

487. The tendency in bridge construction to be observed is the trend towards increasing the horizontal clearance of the free span open to ship traffic in order to promote navigational safety.

G. Tunnels under International Straits and Waterways

488. Finland has put much emphasis on the tunnels under the Straits of Dover and Tsugaru and the planned tunnel under the river Westerschelde. As will be shown in the following sections, these three tunnels are not relevant to the present case.

1. The Tunnel under the Strait of Dover

489. The Strait of Dover, situated between the south-east coast of England and the northern coast of France, connects the high seas of the English Channel to those of the North Sea. In the narrowest parts of its length, the strait is less than 24 nautical miles wide and covered by the 12-mile territorial seas of the United Kingdom and France.

490. In 1963 the British Minister of Transport presented a report concerning Proposals for a Fixed Channel Link to Parliament. The report proposed the construction of either a bridge or a tunnel across the Strait of Dover. As to a bridge solution the report noted that a bridge with a vertical clearance of 70 metres would "... allow the passage of the largest ships in normal weather", see paragraph

1.3 of the report (Annex 55). The report, however, also noted that whilst a bridge across the strait would have certain advantages, it would require "... the concurrence of the States principally concerned with navigation in the Channel", see paragraph 1.9. of the report.

491. It is worth noting that in 1963 the territorial seas of France and the United Kingdom did not exceed three nautical miles from the baselines. Thus, at that time the Strait of Dover contained a high seas channel over which France and the United Kingdom could not exercise sovereignty. Consequently, the 1963 Report from the British Minister of Transport stated that the concurrence of other States was necessary for the construction of a bridge that would cross waters outside the territorial seas of the two littoral States.

492. The statement by the British Minister of Transport thus cannot be quoted as has been attempted in paragraph 345 of the Memorial in support of the existence of a requirement for negotiations among the States concerned if a bridge across an international strait is to be constructed.

493. Economic reasons ultimately dictated a tunnel solution. It appears from the conclusions of the 1963 Report that *inter alia* economic considerations caused the bridge solution to be rejected, see paragraph 1.34 of the report. The report concluded in paragraph 5.12 that "... the results of the economic assessment indicate that the construction of a tunnel under the Channel can now be regarded as reasonable from an economic point of view. We cannot reach the same conclusion about the bridge".

494. At the end of 1971, France had extended the breadth of its territorial sea from three to twelve nautical miles, subject to a median line in the strait, and when the United Kingdom did the same in 1987, the Strait of Dover, for part of its length, was wholly covered by territorial seas.

495. Throughout the Third United Nations Conference on the Law of the Sea, France and the United Kingdom supported the right of transit passage in straits used for international navigation, in the context of acceptance of the 12-mile limit for the territorial sea. The Anglo-French Declaration of 2 November 1988, mentioned in paragraph 342 of the Memorial, is in conformity with the position of the two countries regarding new broad straits created by extension of the territorial seas of the littoral States to twelve nautical miles, as the Declaration established a régime of navigation which takes account of the transit passage régime contained in Part III of the 1982 United Nations Convention on the Law of the Sea.

496. The legal régime applicable to the Strait of Dover is thus not similar to that of the Great Belt, which has always been covered by the territorial sea of Denmark. In the Great Belt, as explained in paragraphs 726 - 742, the right of innocent passage will remain unchanged even after the entering into force of the 1982 Convention on the Law of the Sea according to Article 35 (c) of the Convention.

497. In April 1985 an Invitation to Promoters for the development, financing, construction and operation of a Channel Fixed Link, produced by the British and the French Governments, was sent out. According to the Invitation, promoters could put forward any proposal for a fixed link in so far as certain requirements listed in the Invitation were fulfilled. It was thus evident that various options for a fixed link were still under consideration at that time (Annex 56). Concerning the bridge alternative, it is interesting to note the statement in the Invitation to the effect that a minimum air draught of 70 metres might avoid the need to resort to a procedure of prior approval of the IMO. Notwithstanding the fact that MODUs have been transiting the Strait of Dover frequently over the past years, the two Governments thus held the view that a vertical clearance of 70 metres would not be a violation of international law.

498. In January 1986 the Prime Minister of the United Kingdom and the President of France announced the decision of the two Governments to construct a tunnel under the Strait of Dover. On 20 January 1986 the British Secretary of State for Transport stated in Parliament that the bridge proposal put forward by the Eurobridge Studies Group was eliminated largely on technical grounds (Annex 57).

499. A treaty on the Channel Tunnel between Great Britain and France was signed in February 1986 and ratified by both Governments in July 1987. Construction work on the tunnel was started in 1987, and the work is estimated to be completed in 1993.

2. The Tunnel under the Strait of Tsugaru

500. The Tsugaru Strait, located between Honshu, the main island of Japan, and Hokkaido, the northern island, is at the narrowest point about 11 nautical miles wide. The Japanese Act No. 30 of 2 May 1977 on the extension of the territorial sea of Japan from three to twelve nautical miles expressly exempts the Tsugaru Strait, leaving a channel of open sea in the middle of the strait. Consequently, all ships and aircraft enjoy freedom of navigation and overflight through the Tsugaru Strait outside the jurisdiction of Japan related to navigation. Therefore the Tsugaru Strait does not legally constitute a strait.

501. At the end of the 1950s, when the decision was taken to establish a fixed link between Honshu and Hokkaido, it was on the basis of the existing technology considered impossible to construct a bridge across a strait more than 10 nautical miles wide and with a depth of 140 metres. Instead, Japan decided to construct a bored tunnel under the Tsugaru Strait. The Seikan Tunnel works were commenced in 1964 and completed in 1985.

502. As a bridge solution could not be chosen, the legal implications of constructing a bridge which would cross waters

outside the territorial sea did not arise. Japan's decision to construct a tunnel under the Tsugaru Strait, therefore, is of no relevance to the present case as a tunnel was the only option.

3. PLANS FOR CONSTRUCTION OF A TUNNEL UNDER THE RIVER WESTERSCHELDE

503. The river Schelde rises in northern France and is navigable from the French town of Cambrai. The river runs through Belgium and the Netherlands where it flows into the North Sea. Passing through several States between its source and its mouth, and being navigable from the North Sea, the Schelde, including its lower reach, the Westerschelde, must be classified as an international river.

504. In 1815 the Vienna Congress proclaimed the principle of free navigation on the international rivers of Europe by merchant-men of all nations. The Congress itself gave theoretical recognition to that principle in providing for free navigation on *inter alia* the river Schelde.

505. The Peace Treaty of 19 April 1839 between Belgium and the Netherlands provides for complete freedom of navigation on the river Schelde[75] and embodies the provisions of the Final Act of the Conference of Vienna concerning free passage on navigable rivers.

506. Finland claims in its Memorial, paragraph 353, that the situation of Belgium in respect of the river Westerschelde has an obvious similarity to Finland's situation in relation to the Danish straits. However, there is no such similarity between these two situations. The régime governing the river Westerschelde provides

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[75] See Article IX paragraph 3: "(e)t afin que les dits navires ne puissent être assujettis à aucune visite, ni à aucun retard ou entrave quelconque dans les rades Hollandaises ..."

for complete freedom of navigation, whereas that of the Danish straits only provides for innocent passage, see paragraphs 726 - 742.

507. Moreover, Belgium is a riparian State vis-à-vis the Schelde, and thus has a status quite different from that of Finland.

508. In order to connect two parts of the Province of Zeeland, which is entirely under Netherlands sovereignty, it is planned to construct a fixed link across the Westerschelde. A decision to construct such a fixed link across the river is to be made exclusively by the Netherlands authorities, taking into account their treaty obligations.

509. As can be seen from an answer given by the Netherlands Minister for Transport in the Parliament of the Netherlands in December 1991, a decision to opt for a tunnel solution under the main channel of Westerschelde combined with a bridge or a tunnel across a secondary channel was made in order to keep good neighbourly relations with Belgium (Annex 58). It might be inferred from the answer that the Netherlands authorities apparently do not consider themselves to be under any legal obligation to obtain the Belgian authorities' approval of the project. The answer further shows that the Netherlands authorities are conducting technical consultations with their Belgian counterparts to remove any possible Belgian concern.

CHAPTER XI.

HISTORY OF THE DISPUTE

A. The Silence of Finland

510. By Circular Note of 12 May 1977 the Danish Ministry of Foreign Affairs advised all Heads of Foreign Diplomatic Missions accredited to Denmark of the Great Belt Project which included a high-level bridge across the Eastern Channel with a free vertical clearance of 62 metres above sea level. Several Missions acknowledged receipt of the Note, whereas only the USSR and Poland reacted in substance to the notification. Finland did not react to the Note, see paragraphs 66 - 70.

511. By Circular Note of 30 June 1987 the Danish Ministry of Foreign Affairs advised all Heads of Foreign Diplomatic Missions accredited to Denmark of the Project (Annex 25). The Diplomatic Missions were informed that the motorway crossing the Eastern Channel would be either a high-level bridge or a tunnel. This Note did not give rise to any reactions from foreign States.

512. On 9 September 1988 *A/S Storebæltsforbindelsen* recommended to the Minister for Transport that the road connection across the Eastern Channel should be carried out as a high-level bridge, and that consequently a tunnel solution should not be put out for tender. This recommendation was widely reported in the Danish press at the time. Also foreign news media, including Finnish newspapers, reported on the latest developments in the Great Belt Project. On 4 November 1988 the Minister for Transport approved the recommendation. No formal communication was made at the time since the vertical clearance of the East Bridge was not yet decided, see paragraphs 111 - 113.

513. Denmark had no reason to believe that the Great Belt Project would be detrimental to the interests of Finland, let alone

that Finland regarded the Great Belt Project as a violation of Finland's rights.

514. On 17 March 1989 the Ambassador of Denmark in Helsinki paid his farewell visit to the President of Finland. On that occasion the President expressed his delight to find that there were no disagreements or problems between Finland and Denmark (Annex 59).

B. Consultations between the Parties prior to the Court's Order of 29 July 1991

515. It was not until July 1989 that Finland reacted to the Great Belt Project i.e., more than 12 years after the first and basic diplomatic communication concerning the Project was circulated. On 18 July 1989 the Commercial Department of the Embassy of Finland in Copenhagen sent a letter to the Danish Maritime Authority. The Danish Authorities were informed that representatives of the Finnish industry who had followed the planning of a fixed bridge over the Great Belt had asked the Embassy of Finland how large transports by sea through the Danish straits could be carried out in the future in case the bridge would have the dimensions planned. In the letter it was further stated that, according to available information Finland's large transports, e.g., drilling platforms with a free height of 150 metres, would be obstructed by the new bridge. If this was the case, Finland requested information on possible alternative routes (Annex 60).

516. The Finnish inquiry was answered by the Danish Ministry of Foreign Affairs in a letter of 29 August 1989 confirming that passage under the bridge would not be possible for structures measuring 150 metres in height. The Danish Ministry of Foreign Affairs pointed out that such structures would be able to pass through the Sound provided their draught did not exceed 8 metres. Moreover, it was suggested that the rigs be transported

partly dismantled, thus permitting passage under the Great Belt Bridge (Annex 61).

517. In the following months, several meetings were held between representatives from Denmark and Finland in the context of traditional, bilateral contacts between the two countries on a variety of subject-matters. Prior to each of these meetings an agenda was made. Finland did not propose to include the Great Belt Project in any agenda in advance of those meetings.

518. In a letter of 25 August 1989 from the Finnish State Secretary Åke Wihtol to the Danish Permanent Under-Secretary of State Otto Møller a draft agenda was proposed for talks to be held on 20 September 1989 (Annex 62). In the letter Mr. Wihtol concluded that he did not have any questions concerning bilateral matters, thereby confirming the remarks by President Koivisto to the Danish Ambassador quoted in paragraph 514. At the meeting between State Secretary Åke Wihtol and Permanent Under-Secretary of State Otto Møller on 20 September 1989 general political and economic issues were discussed. At the end of the meeting Mr. Wihtol told Mr. Møller that the Finnish Embassy in Copenhagen had not yet received an answer to a letter sent to the Danish Maritime Authority concerning the transport of drilling platforms. Apparently, Mr. Wihtol had not at the time been informed of the Danish Ministry of Foreign Affairs' reply to the said letter sent already on 29 August 1989 to the Embassy of Finland in Copenhagen.

519. On 24 October 1989 the Danish Ministry of Foreign Affairs issued another Circular Note advising *inter alia* on the exact height of the high-level bridge across the Eastern Channel which was set at a vertical clearance of 65 metres (Annex 31).

520. The Finnish Minister for Foreign Affairs, Mr. Pertti Paasio, did not raise any question concerning the Great Belt Project when on 13 November 1989 he had an hour-long conversation in

Copenhagen with the Danish Minister for Foreign Affairs, Mr. Uffe Ellemann-Jensen.

521. During the regular bilateral consultations on trade issues between civil servants from the Foreign Ministries of both countries held in Copenhagen on 5 February 1990 the Finnish representatives raised the issue of the passage of drilling platforms through the Great Belt. The issue had not in advance been placed on the agenda for the consultations, and the Finnish representatives suggested that Finnish experts on international law should explain their views to the Danish Ministry of Foreign Affairs.

522. This meeting took place in Copenhagen on 15 May 1990. Finland stated as a matter of fact that a bridge clearance of 65 metres would render impossible the passage of Finnish MODUs through the Danish straits. In the opinion of Denmark the Fixed Link was in conformity with international law, allowing ships of all nations which had used the Great Belt in the past to pass under the bridge with its clearance of 65 metres. Finland doubted the Danish interpretation of the concept of innocent passage. The Finnish delegation stated at the end of the meeting that the consultations should not be regarded as an official *démarche*.

523. In a Note of 19 June 1990 the Embassy of Finland, referring to the Danish Circular Note of 24 October 1989, expressed Finland's reservations to the Great Belt Project, making for the first time an official diplomatic request for bilateral talks before a final decision was made on the bridge project in order to secure free passage through the Great Belt for e.g., oil drilling rigs requiring a clearance of up to 200 metres and a minimum draught of 12 metres (Annex 63).

524. The Danish Ministry of Foreign Affairs replied in a *Note Verbale* of 11 July 1990 to the Embassy of Finland in Copenhagen. The Danish Ministry of Foreign Affairs referred to the Circular Note of 24 October 1989 in which it was stated that the Fixed Link across the Great Belt in all respect fulfils international

law by permitting free passage for all existing ships which have used the strait for passage. Consequently, the Danish Ministry of Foreign Affairs was of the opinion that the points raised by the Finnish authorities did not offer ground for any negotiations concerning the Great Belt Project. The Danish authorities would, however, not reject a Finnish request for consultations between the respective authorities on any practical, technical possibilities of solving, in any other way, the problem mentioned by Finland (Annex 64).

525. On 26 July 1990 the Chargé d'Affaires of Finland called at the Ministry of Foreign Affairs in Copenhagen, acting upon instructions from his Government, to inform the Danish authorities that in the Finnish view the right of passage also included drill rigs. Denmark maintained the view expressed in the *Note Verbale* of 11 July 1990.

526. On 30 August 1990 the first technical meeting was held in Copenhagen at the office of *A/S Storebæltsforbindelsen*. Mr. Seppo Silvonen, Marketing Director of *Rauma-Repola Offshore Oy*, participated in the meeting. Mr. Silvonen explained that *Rauma-Repola Offshore Oy* approximately once a year produced a drilling rig or a similar construction with an air draught of up to 160 metres. Mr. Silvonen claimed that these constructions were transported on ships with a draught of 15 metres. At the meeting Mr. Silvonen stressed that the costs incurred by making the necessary and feasible modifications of the *Rauma-Repola Offshore* products to enable them to pass through the Danish straits after completion of the Great Belt Project had to be borne by others than *Rauma-Repola Offshore Oy*.

527. In a *Note Verbale* of 7 September 1990 Finland suggested that discussions between experts on international law be simultaneously with the technical negotiations (Annex 65).

528. Denmark responded to the Finnish suggestion in a *Note Verbale* of 2 October 1990 advising that a technical meeting at *A/S*

Storebæltsforbindelsen had been arranged (Annex 66). The Danish Ministry of Foreign Affairs explained in the Note that it did not find it appropriate that purely legal aspects were included in technical consultations but would be "happy to receive members of the Finnish delegation during its stay in Copenhagen"[76].

529. The meetings suggested in the Danish *Note Verbale* of 2 October 1990 took place on 17 October 1990. Legal issues were discussed at a meeting held in the Danish Ministry of Foreign Affairs. Each side maintained their different understanding of the right of passage through the Danish straits. The Danish side also expressed its astonishment that Finland had not reacted to the previous notifications of 1977 and 1987. The possibility of finding a technical solution was discussed at a meeting held at *A/S Storebæltsforbindelsen*.

530. In a *Note Verbale* of 5 November 1990 to the Danish Ministry of Foreign Affairs Finland suggested a discussion on inserting a movable span in the West Bridge (Annex 67).

531. While retaining its position that the Fixed Link in its entirety conformed to the requirements of international law, Denmark undertook at the request of the Finnish side to investigate without prejudice the possibility of inserting a passage opening in the West Bridge, either as a dismountable span or a movable bridge. However, the conclusion was that for technical reasons it would not be feasible to modify the West Bridge as requested by the Finnish side.

532. In a letter of 9 November 1990 to the Danish Minister for Industry the Finnish Minister for Foreign Trade expressed his wish to discuss the Great Belt issue at the meeting of the Nordic Ministers for Foreign Trade in Helsinki on 20 November 1990

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[76] The description given by Finland in the Memorial (para. 366) of the content of the Danish *Note Verbale* of 2 October 1990 might give a slightly distorted impression of the Danish reply.

(Annex 68). The Danish Minister for Industry explained at the meeting that the issue did not fall within her competence.

533. On 23 January 1991 Danish and Finnish representatives met in Copenhagen for further talks on possible, technically feasible solutions. Finland suggested e.g., a draw bridge or a tunnel. Denmark did not consider these proposals to be realistic and pointed out that the practical solution to the problem would be to use the passageway through the Sound or to complete the assembly of the oil drilling rigs after the bridge had been passed. The Finnish delegation rejected this solution as it would allegedly deprive the Finnish shipyard *Rauma-Repola Offshore Oy* of its competitiveness. The Finnish delegation never substantiated this claim nor did it put forward any suggestions as to how a technical solution to its problem could be found in modifications of the oil drilling rigs. At this meeting, the issue of drill ships was for the first time introduced by Finland.

534. The inaccuracy of the factual basis of the Finnish claims is clearly demonstrated in the *Note Verbale* of 19 June 1990 stating that "oil drilling rigs require a navigational clearance of up to 200 metres, and the depth of water must be at least 12 metres" (Annex 63). The rigs apparently had added 50 metres to their height since 1989. In fact, no rig exists in the world combining an air draught of 150 metres with a draught of 12 or 15 metres, and a rig measuring 200 metres still remains to be seen.

535. On 11 February 1991 the Danish Prime Minister received a letter dated 6 February 1991 from his Finnish colleague requesting further negotiations to protect Finnish interests (Annex 69).

536. The Danish points of view were summed up in a letter of 20 February 1991 from the Danish Prime Minister to his Finnish counterpart (Annex 70).

537. After the Finnish Application and Request for the Indication of Provisional Measures had been filed with the International Court of Justice in May 1991, the issue was further discussed between the Prime Ministers of Denmark and Finland during the visit of the new Finnish Prime Minister to Copenhagen on 25 June 1991. It was, however, not possible to settle the matter, although the Danish Prime Minister in a spirit of compromise suggested several options to be studied, *inter alia* the possibility of a further dredging of the Sound. Finland, however, did not respond to these suggestions, and the oral proceedings on the Request for the Indication of Provisional Measures opened on 1 July 1991.

C. Negotiations between Finland and Denmark subsequent to the Court's Order of 29 July 1991

538. Considering the statement made by the International Court of Justice in its Order of 29 July 1991, paragraph 30, welcoming "any negotiation between the Parties with a view to achieving a direct and friendly settlement", the Prime Ministers of Denmark and Finland agreed to a meeting between Mr. Ulrik Federspiel, Permanent Under-Secretary of State for Foreign Affairs of Denmark, and Mr. Martti Ahtisaari, State Secretary of the Finnish Ministry of Foreign Affairs, for the purpose of furthering talks between the Parties.

539. As a first result of these contacts a Danish-Finnish Technical Working Group was established and its mandate adopted at a meeting on *Sprogø* in the Great Belt on 22 August 1991. At that meeting, the Finnish delegation had the opportunity to get a first-hand impression of the actual project in progress. At a following meeting in Copenhagen, the Finnish delegation had the opportunity to study the navigational conditions of the Drogden Channel during an excursion by boat.

540. Denmark did not oppose the discussion of any proposals, as can be seen from the mandate for the Technical

Working Group, (Annex 72 to the Memorial). The mandate was balanced in favour of the Finnish ideas as to how the conflict could be solved. The Finnish view remained the same as before the Application was submitted to the Court. Finland was only willing to discuss what Denmark could do to solve the conflict by modifying the Great Belt Project - not what Finland could do by modifying their rigs.

541. Denmark did in good faith investigate how to enable the Finnish oil rigs to pass through the straits after the completion of the bridge as planned. Finland, uncompromisingly, demanded either an opening in the bridge, dredging of the Drogden Channel to 15 metres or 10 metres combined with financial compensation, or an undefined compensation for "lost opportunities". Such claims did not further the prospects of an amicable settlement.

542. The Finnish proposals to insert an opening in the East Bridge had been rejected by the Danish side for a number of reasons, in particular because of the high risks of collision involved in such a procedure (Annex 72, pages 238 - 239 to the Memorial). These reasons are further explained in Annex 71 to this Counter-Memorial.

543. Denmark mentioned the possibility of increasing the height of the bridge by 3.8 metres. Furthermore, dredging the Drogden Channel was considered a serious option by Denmark, and consequently it was proposed to investigate that option, including the environmental impact assessment. Finally, Denmark was prepared to offer its help in transporting the Finnish oil rigs through the Drogden. In mentioning these proposals it was pointed out by the Danish side that in accordance with the principle of equal burden sharing the costs involved would have to be shared on a fifty-fifty basis.

544. During the negotiations through the months of August and September 1991 the Danish side made it clear that it was striving to reach a realistic and reasonable settlement before the

contracts for the East Bridge were to be signed in mid-October 1991. Thus the Report of the Technical Working Group was submitted on 8 October 1991 for further consideration by the two Parties. However, no immediate progress was in sight and on 22 October 1991 the contracts for the high-level East Bridge were signed. Finland's description of this fact in the Memorial (para. 156) might leave the impression that Denmark was not negotiating in good faith, an allegation also found in Ambassador Grönberg's letter of 5 February 1992 to the Registrar of the Court. However, it was the mutual understanding during the talks that it was for Denmark alone to make the decision on the signing of the contracts for the East Bridge, which would not prejudice the outcome of the negotiations or violate the letter or spirit of the Court's Order of 29 July 1991.

545. When the Permanent Under-Secretary of State for Foreign Affairs of Denmark and the State Secretary of the Finnish Ministry of Foreign Affairs met again on 26 November 1991, the only basis for a settlement seemed to relate to the question of finding ways of accommodating the Finnish MODU yard with a lump sum. Suggestions to this effect, which should be seen as a gesture on the part of Denmark, were made only *ad referendum*.

546. During renewed contact in Helsinki on 27 - 28 February 1992 between the Danish Minister for Foreign Affairs and the President of Finland and Members of his Government it was agreed to pursue actively the efforts towards reaching a negotiated settlement. These efforts are still in progress. The latest contact between the two Foreign Ministers took place in connection with the Spring Session of the Conference of Nordic Ministers for Foreign Affairs in Helsinki on 4 - 5 May 1992.

547. Unfortunately, the Finnish position during the whole course of negotiations has been shifting from the oil rigs originally subject to discussion to a wider choice of vessels, as reflected in the concept of "reasonably foreseeable ships" which was included in the Application and further expanded by the concept of "other special

ships" in the Memorial[77]. Considering the importance of the offshore industry claimed by Finland during the bilateral talks, this shift was rather surprising, emphasizing an even more remote risk for Finnish industry. As has been demonstrated in Chapter IV, Part I, the Great Belt Bridge creates no difficulties for the passage through the Danish straits of any existing or reasonably foreseeable ships.

548. It is also regrettable to note that Finland throughout the negotiations has insisted that any negotiated result must be based on the assumption that Finland has an absolute right of passage through the Great Belt. Denmark would consequently be obliged to bear all costs and burdens to accommodate Finland either by changing the Great Belt Project or through the payment of compensation based upon a concept of alleged "lost opportunities" during the next 100 - 150 years corresponding to the projected period of the existence of the bridge. This inflexible position on the part of Finland has not been conducive to the reaching of a negotiated settlement.

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[77] The Memorial fails to draw attention to this addition by simply stating that "Finland repeats the submissions it made in its Application." (para. 560 of the Memorial).

PART II

THE LAW

CHAPTER I.

DANISH SOVEREIGNTY

549. An essential characteristic of the present case relates to the fact that the part of the Great Belt where the Fixed Link, including the high-level bridge across the Eastern Channel, is being constructed is in its entirety *Danish territorial sea*, see paragraph 32 and Maps II - III. As the sovereignty of a State extends to its territorial sea - confirmed in Article 1 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone as well as in Article 2 of the 1982 United Nations Convention on the Law of the Sea - it follows that any legal evaluation concerning a State's activities in its territorial sea must take as its starting point the sovereign rights enjoyed by States over their territory. Special rights for certain foreign States or the international community at large may restrict the territorial sovereignty otherwise enjoyed, but such restrictions are not to be presumed and need a clear legal foundation. In the words of the Court,

> "... (i)nternational law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed..." (the *Lotus* case, *P.C.I.J. 1927 Series A, No. 10*, p. 18).

550. As far as the Great Belt is concerned it is the right of passage of foreign ships - as regulated *inter alia* in the Copenhagen Treaty of 1857 and the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone - which may place certain restrictions on the sovereign right of Denmark to build a bridge of vital interest to the development of the Danish society.

551. In its Memorial Finland concedes this point by stating that

> "... territorial sovereignty over the land whose coasts border the strait and over the waters of the strait includes the right to build a fixed link between the coasts separated by the strait ..." (para. 420).

552. The Memorial (para. 8, p. 5 - 6) further admits that "Finland is not disputing Denmark's right to build a bridge over the Great Belt.". In sum both Parties agree that Denmark as the sovereign strait State has a right to build the bridge across the Great Belt. The question is then whether the design of the East Bridge violates a special right, enjoyed by Finland, of passage for some particular ships or certain kinds of craft - a violation which has not been alleged by any other State: not surprisingly as the high-level East Bridge across the Great Belt *leaves open* the possibility of passage by all existing ships using that waterway.

553. Whereas the sovereign right of Denmark over the Great Belt is well established, the Respondent Government has not been able to identify a special right belonging to Finland which would prohibit Denmark from building the East Bridge as planned.

554. As to Danish sovereignty over the Great Belt, some landmarks in the history of the Danish straits should be recalled[78].

555. For a period of about 700 years stretching from the very creation of the Kingdom of Denmark around the year 950 and until the cession of the provinces east of the Sound to Sweden in the year 1658, both shores of all three straits formed an integral and uncontested part of Danish territory.

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[78] In general reference is made to Erik Brüel, *International Straits*, (London 1947) Vol. I, pp. 103 - 104 and Vol II, pp. 18 - 28.

556. The fact that the straits formed part of the Kingdom of Denmark and as such were subject to the exclusive sovereignty of the King of Denmark naturally meant, at that time, that they could only be used for fishing, passage or for any other purpose with the permission of the King of Denmark, which permission might naturally be given subject to certain conditions.

557. From about the year 1430 one of these conditions was the imposition of a certain due on every merchant vessel passing through the Sound, the so-called Sound dues, which were later extended to the Belts.

558. The recognition, both express and tacit, which the dues acquired within a relatively short period of time and through which they gained a solid basis in law must be viewed in the light of the fact that the Straits, according to the view prevailing at that time, were acknowledged to have the same status as other parts of the territory.

559. With the increase in international commerce and shipping, the dues gave rise to many protests culminating in their abolition by the Treaty of Copenhagen of 14 March 1857, combined with a compensation to be paid to the Kingdom of Denmark by the participating States.

560. By a Peace Treaty in 1864 the Danish King had to cede *inter alia* the southern part of the western shore of the Little Belt to Prussia and Austria-Hungary. After World War I Denmark regained this territory.

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561. The 1857 Copenhagen Treaty contains in its Article 1 the central stipulations concerning the abolition of the Sound and Belt dues. In connection with the abolition of the dues it is in the same Article laid down that in the future no ship shall under any pretext whatsoever be subjected to any detention or hindrance on its

way through the Sound or the Belts. In accordance with this obligation it has since the conclusion of the 1857 Treaty been the Danish practice to secure a right of innocent passage through the Danish straits for ships of all nations.

562. Today the actual practice may be summarized as follows, leaving aside the questions relating to passage in times of armed conflict. The 1857 Treaty in its Article 2 stipulates that the existing lights and buoys in the Kattegat, the Sound and the Belts, even outside the Danish territorial sea, shall be maintained and kept in order, and that Denmark, as in the past, shall study the possibility of improving the number and function of these lights and buoys in the general interest of navigation. The Article furthermore lays down that Denmark shall keep and maintain a pilot service in the same waters, use of which shall be at the discretion of the masters of the ships in passage. On the same conditions Denmark shall also permit private persons or companies, both Danish or foreign, to station towage vessels in the Sound and the Belts for ships in passage which would like to use a towage service.

563. The Government of Denmark has always taken great care in honouring these obligations in the 1857 Treaty. The obligation concerning lights and buoys is today fulfilled by the establishment of a buoyage system developed by the International Association of Light House Authorities and recommended by the International Maritime Organization. Any inquiry from navigators suggesting establishment of new aids to navigation or alteration of the existing marking system is made subject to thorough evaluation and consideration by the Danish Administration of Navigation and Hydrography.

564. The Administration of Navigation and Hydrography is also responsible for the pilotage service which has been available in Danish waters since 1857. For ships in transit the use of pilots is voluntary as laid down in the 1857 Treaty.

565. As regards the towing obligation in the Treaty, private shipping companies have always been allowed to station towage vessels in Danish waters including the Sound and the Belts. Today, Danish owned towing capacity is available and ready to assist on short notice. Foreign towage vessels, *inter alia* German, Dutch, and Swedish, do also operate from time to time in Danish waters.

566. In addition to the obligations in the 1857 Treaty, the Government of Denmark has taken many measures to enhance the safety of navigation through Danish waters, including the straits.

567. A coastal rescue service has been in existence since 1852, and in ice conditions Danish icebreakers will render free assistance to shipping both inside and outside the territorial sea.

568. In the 1970s the increase both in the volume and size of the ships navigating the Danish waters in transit to and from the Baltic Sea led the Government of Denmark to seek international recognition of the need for a special transit route for ships over a certain size. The object was to ensure the safety of navigation of large ships passing through Danish waters and to reduce the risk of oil, gas or other chemical pollution from the grounding or collision of tankers.

569. Thus the International Maritime Organization in its Resolution A. 339 (IX) of 12 November 1975 recommended that such a routeing system should be established. The Government of Denmark subsequently established this route, Route T, which with a charted minimum depth of 17 metres in the area northeast of *Gedser*, the southernmost point on East Denmark, covers the waters from there to *Skagen*, the northernmost point on the Jutland Peninsula, through the Eastern Channel of the Great Belt. Route T includes several traffic separation schemes in particularly dangerous areas. A detailed description of Route T by Mr. Anker Nissen, Head of Inspectorate, Danish Administration of Navigation and Hydrography, is reproduced in Annex 1 to the Memorial.

570. In addition to Route T, which is duly publicized on official charts, a radio reporting service (SHIPPOS) for ships in transit in Danish waters has been established. The purpose of this radio reporting service among other things is to facilitate navigation by informing shipping about the movement of large ships, about navigational hazards and deviations from normal current, water level and wave height.

571. In order further to improve navigation conditions in Route T, especially in the area east of the island of *Samsø* where the reef *Hatter Barn* is situated, and where many groundings have taken place, the Danish maritime authorities put out several more buoys and published new and better charts. This did not, however, prove to be enough to enhance safety, and the Government of Denmark then decided to dredge a 3 nautical miles long straight channel through the *Hatter Barn* area and to introduce a traffic separation scheme in connection herewith. These measures were completed on 1 April 1984, and they have resulted in better and safer navigation.

572. When it specifically comes to *merchant ships*, they have since the 1857 Treaty enjoyed a right of innocent passage through the Danish straits. Merchant ships that have exercised innocent passage will continue to be able to enjoy this right after the construction of the Fixed Link across the Great Belt, as the clearance of 65 metres will allow all of these ships to pass under the high-level bridge over the Eastern Channel of the Great Belt, in even greater safety than before, because of the reduction of ferry traffic.

573. *Oil rigs and other floating units* have since the mid-1970s occasionally passed through the Danish straits. Various Danish Governments have not considered these craft as having exercised a right of innocent passage when they in the past have been towed or transported through the Danish straits. This follows from the 1977 Circular Note, see paragraph 135.

574. As the 1857 Treaty does not regulate the passage of *foreign warships* through the Danish straits a set of customary rules has developed over time[79]. These rules have found their latest expression in Ordinance No. 73 of 27 February 1976 (Annex 72). According to that Ordinance foreign warships are free to exercise the right of innocent passage in the Sound and in the Great Belt without any requirements as to prior permission or notification. Only if four or more warships of the same nationality simultaneously seek passage is notification required, at least three days in advance, failing which the passage is deemed to lose its innocent character.

575. Passage of the Little Belt and the Drogden Channel in the Copenhagen Road area by foreign warships can take place when prior notification is given. The geographical character of the Little Belt, with its narrowness and the winding of this waterway through Danish heartland, has for security reasons called for this stricter measure of prior notification for any foreign warship. Security considerations also apply to the Drogden Channel with its proximity to the capital of Denmark and its position in the internal waters of the Copenhagen Road area. The fact that both the Little Belt and the Drogden Channel are delimited as internal waters can not in itself, however, change the status of these waterways as components of the Danish straits, in so far as they are used for international navigation, see paragraph 441.

576. For *foreign submarines*, it is prescribed in the Ordinance in accordance with Article 14, paragraph 6 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone that they shall navigate on the surface when in passage in the Danish territorial sea and internal waters, including the straits.

577. Finally, as far as *foreign military aircraft* are concerned, they do not enjoy a right of innocent overflight according to

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[79] See Erik Brüel, *International Straits*, Vol. II, p. 54, section 8.

customary international law, and consequently the Ordinance makes prior permission mandatory for such flights over Danish territory, including the straits.

578. Denmark, thus, believes that throughout the centuries it has been able as a strait State to protect and promote the interests of the international community in using the Danish straits as a passage from the North Sea to the Baltic Sea and vice versa.

579. In drawing this conclusion it must be kept in mind that the geographical function of a strait is not only concerned with the particular waters it joins but is equally concerned with the two territories it separates. From the point of view of Denmark the straits have throughout the more than thousand years of Denmark's history been regarded as Danish national territory - which they surely are - and of vital interest to the well-being and indeed the survival of the Danes. Dr. Brüel makes this point at the very beginning of his treatise on international straits where he writes:

> ".... (t)he function of separation, however, is often merely a separation in space, because straits, by being the waters, where the two territories separated by them, are closest to each other, frequently become the natural place of crossing. In this way the function of the strait, even if it separates the territories in space, becomes that of connecting them by traffic ... This function of the strait as a connecting link between the two territories separated by them, is the origin of the "twin-cities", characteristic of so many straits, and corresponding to the ferryplaces on both sides of the strait. (Istanbul-Skutari, Messina-Reggio, Brindisi-Durazzo, Dover-Calais, Korsør-Nyborg, Elsinore-Hälsingborg etc.).
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> ....
>
> Even under the most perfectly developed ferry-system the straits are, however, a hindrance to the traffic. This is strongly felt to-day when speed is so important. ... a permanent bridge across an international strait was

> completed for the first time in history, when the bridge across Little-Belt was inaugurated on May 14 1935. Plans for bridges or tunnel-connections have, however, also been proposed regarding other straits, as f.i. Great-Belt, the Sound, the Bering-Strait, the Strait of Calais, Belle-Isle Strait, the Strait of Gibraltar, Palk-Strait. We are, no doubt, only at the beginning of a fruitful development." (pp. 20 - 23, Vol. I).

580. This last part of the statement touches exactly upon the core of the present development in the Baltic as far as traffic is concerned. Bridges are being built across the Great Belt. A fixed link consisting of a tunnel, a low-level bridge, and a high-level bridge across the Sound between Copenhagen and *Malmö* have been agreed to by Denmark and Sweden. Finally, a fixed link is being considered across the *Femer Bælt* between Denmark and Germany thus completing effective traffic links between the European Continent and the Nordic countries.

581. This development has been supported by the European Parliament. In the Report, referred to in paragraphs 170 - 171, on permanent links across certain sea straits which was delivered by the European Parliament's Committee on Regional Policy and Transport it is stated that the Great Belt Bridge would lead to a very significant improvement in the most important link between east and west in Denmark and would bring about a significant improvement in the links between Central Europe and Sweden (Annex 32). In the Report dated 21 June 1991 referred to in paragraph 175 (Annex 34), the Parliament:

> "... Calls on the Commission and Council to recognize the importance to the Community of a number of major transport infrastructure projects in which EFTA countries are involved and to seek better coordination of those plans ...; confirms the general European importance of the following projects for key links between the Community and EFTA, and for them to be given the same favourable terms, where

private sector finance is involved, as if they were purely Community projects:

a) The Scanlink project

- *Øresund* rail and motorway bridge between Sweden and Denmark

.....

- Rail and motorway bridge over the Great Belt

.....

- Permanent rail link across the *Fehmarn* Belt (*Rødbyhavn-Puttgarden*)

....."

582. The infrastructure projects referred to above will not only benefit the countries which are being directly connected, but constitute a vital part of the whole European integration process.

583. The traffic figures alone for the Great Belt show the enormous discrepancy between the east-west land-traffic and the north-south water traffic as of today. More than 54,000 ferries cross the Great Belt yearly whereas only a little more than 20,000 ships pass through the Great Belt every year. These figures, moreover, make it abundantly clear that the bridge, far from presenting any hindrance to the existing traffic of ships through the Great Belt, effectively will enhance the safety of the north-south bound traffic by removing the much more intense east-west crossing ferry traffic.

584. In balancing the sovereign interests of a strait State with the interests of the world community, history, as far as the Danish straits are concerned, has reached a point of conciliation between the concept of innocent passage and the strait State's sovereign right to regulate and supervise in detail the implementation of the passage - both concepts being embodied in the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone. It is through this broad regulatory power that the strait State takes the lead in setting the norms governing the passage through its straits.

If the international community does not agree with the way in which the strait State administers the passage, it is up to that community to react without undue delay. The concept of reasonable regard to the interests of other States embodied in Article 2 of the 1958 Geneva Convention on the High Seas implies *a fortiori* that reasonable regard should be given to accommodate the vital interests of the coastal State in its own territorial sea.

585. That such regard has been given to Denmark's vital interest in constructing the Fixed Link across the Great Belt is shown by the fact that States have accepted Denmark's right to build the East Bridge - except for the Finnish objection on 19 June 1990, more than 12 years after the first specific written notification was issued about the high-level bridge and its height.

586. In this connection it is important to note that the right in principle to build a bridge across a State's territorial sea has never been contested. It is the design of the bridge in the relevant shipping lanes which must not prevent the ships of foreign States from sailing through the territorial sea or adversely affect their safety. It is the submission of the Government of Denmark that the East Bridge fulfils these requirements and must be assessed against the basic concept of sovereignty and the factual circumstances governing the passage through the Danish straits. Among these circumstances is the fact that MODUs do *not* themselves navigate the straits, but are either towed through or transported on heavy-lift ships.

CHAPTER II.

LEGAL CONSIDERATIONS PRIOR TO THE PRESENT DISPUTE

587. The legal questions arising in connection with the construction of a fixed link across the Great Belt as a consequence of the special geographic characteristics of the Belt as an undisputable part of the Danish territorial sea, while at the same time connecting two parts of the high seas, were carefully considered by the successive Danish Governments from the very beginning of the planning of a fixed link, taking into account the development in international law.

588. As early as 1936 when the possibilities for constructing bridges across the Great Belt and the Sound were discussed, the Danish Ministry of Foreign Affairs in a letter dated 23 May 1936 to the Danish Ministry of Public Works, stated as its view that nothing precludes the construction of bridges across the Great Belt and the Sound provided the design of the bridge(s) does not impede passage to and from the Baltic Sea by even the largest ships existing at the time, see Annex 1.

589. In his treatise on international straits Dr. Erik Brüel also accepts that bridges may be built across the Danish straits as long as the strait does not cease to be a navigable waterway. This criterion may be fulfilled even though not all existing ships are able to pass under the bridge. Dr. Brüel states: "Bridges and embankments must be so constructed that practically all ships can pass under, respectively through, them without such difficulties in manoeuvring that the strait ceases to be a navigable waterway." (p. 43, Vol. II).

590. Ten years later the legal adviser to the Danish Ministry of Foreign Affairs, Professor Max Sørensen, rendered an opinion, dated 4 February 1957, on the aspects of international law related to the fixed traffic link across the Great Belt. The opinion was later

published as part of the Report of the Government Commission to study the possibilities for constructing a bridge across the Great Belt (para. 42) and is reproduced in Annex 2.

591. Professor Max Sørensen takes as his starting point the fact that the area where the construction of a bridge is being considered is, in its entirety, the territorial sea of Denmark. Consequently, the Danish State is entitled to establish such installations and structures as are not incompatible with any special rights enjoyed by foreign States, *in casu* the right of innocent passage of foreign ships. In evaluating this problem, Professor Max Sørensen reaches the following conclusions:

> "... I therefore advance the argument that - in relation to the evaluation of the question in the context of international law - the position adopted by the Danish Ministry of Foreign Affairs in its letter of 23 May 1936 should in principle be maintained, according to which nothing precludes the construction of a bridge across the Great Belt, always provided that the bridge structure is made conditional upon such a design as will not in any manner hamper the passage of the biggest vessels existing at the present time. This interpretation should be understood to mean that
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> (1) the passage clearance has to comply with this requirement,
>
> (2) the bridge piers must be positioned in a way which does not hamper passage, and
>
> (3) the requirements set out under (1) and (2) above must be complied with, at least in respect of the sea lane(s) which is/are normally used for international navigation between the North Sea and the Baltic Sea, but not necessarily in respect of secondary sea lanes."

592. Following the conclusion of the First Conference on the Law of the Sea in 1958 and the adoption of the Convention of 29 April 1958 on the Territorial Sea and the Contiguous Zone, Professor Max Sørensen rendered an additional opinion, dated 29 January 1962, evaluating the impact of the rules on the right of passage contained in the Convention on the conclusions reached in the above quoted opinion of 4 February 1957. The opinion is published in the Report of the Working Committee, 1968 (para. 49) and reproduced in Annex 7. A thorough analysis of the relevant articles as adopted at UNCLOS I, to which Professor Max Sørensen was accredited as Head of the Danish Delegation, leads him to conclude:

> "... Against the background of the present provisions of the Convention, there is no doubt that they will involve no revision of the statement of 12 February 1957 by the Ministry of Foreign Affairs[80] ...
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> Therefore, in the light of the wording of Article 16(4) of the Convention adopted at the Geneva Conference of 1958, it cannot be deemed necessary to deviate from point (3) of the statement of 12 February 1957 by the Ministry of Foreign Affairs. It must still be possible to maintain that the requirements for the freedom of navigation do not necessarily have to be complied with as far as secondary sea lanes are concerned. ...."

593. In the same opinion Professor Max Sørensen evaluates a proposal to construct a lower bridge across the Eastern Channel, which will thus obstruct the passage of major ships, and a tunnel under the Western Channel, which will at the same time be navigable by even the biggest vessels as the sea lane will be

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[80] Letter of 12 Feb. 1957 from the Ministry of Foreign Affairs to the Ministry of Public Works incorporating the legal opinion by Professor Max Sørensen of 4 Feb. 1957, see para. 42.

dredged to attain a depth of 15 metres on stretches where its natural depth is lower. He concludes:

> "... that nothing can be said with certainty about the compatibility of the above-mentioned project with Denmark's obligations under international law, but that the question is associated with not inconsiderable doubts. With due regard to the importance of the interests at stake, I feel that I am not in a position to advise the implementation of a project which raises such doubts, irrespective of the technical and economic advantages offered by the project. ...."

594. On 22 October 1962 Professor Max Sørensen delivered the following opinion on *inter alia* the impact of the Convention of 29 April 1958 on the Continental Shelf on the construction of a bridge across the Great Belt. The opinion is published in the Report of the Working Committee (1968) and reproduced in Annex 73. The conclusion reached is clear:

> ".... As far as the territorial sea is concerned, the construction of a bridge across a passage-way of water cannot be deemed to be contrary to the coastal State's obligations under international law on the ground of the Convention on the Continental Shelf or on other grounds, provided that the breadth and height of the spans are such that the passage of any foreign ship is not hampered."

595. Finally, Professor Max Sørensen wrote an opinion to the Ministry of Foreign Affairs in March 1971 about the Project for a Fixed Link across the Great Belt which was adopted as law two years later by Act No. 414 of 13 June 1973 i.e., a low-level bridge across the Western Channel and a high-level bridge across the Eastern Channel corresponding to the actual project under construction. The opinion is reproduced in Annex 8. The conclusion reached is as follows:

> "... The information accumulated so far thus points unambiguously to the conclusion that the Western Channel is not used for passage of international ships through the Great Belt. Bearing in mind the importance of the question, however, I would find it desirable to undertake an attempt to support the available information still further, notably with regard to the passage of foreign warships. Provided continued investigations fail to produce any factors which distort the information already available, I consider myself in a position to conclude that the Western Channel must be regarded as a secondary sea lane which is not normally used for international navigation and that Denmark's obligations under international law will therefore not be disregarded if passage through this lane is precluded by a low-level bridge. ..."

596. Of particular interest is the reference made in this legal opinion to the considerations given to a fixed link between Denmark and Sweden in which context floating objects such as drilling platforms were commented upon in the following way:

> "... As far as various possible bridge constructions were concerned, it was stipulated that the clearance and the positioning of the bridge piers were not allowed to preclude or impede the passage of even the biggest vessels of our time which are capable of passing through the Sound - irrespective of whether the vessel in question sailed in ballast or with cargo. On the other hand, only ships could be taken into account, not other floating constructions, such as drilling platforms, which might pass through the Sound by way of towing. ..."

597. In 1973 Professor Max Sørensen left the Ministry of Foreign Affairs having been appointed judge to the Court of the European Communities in Luxembourg. While serving as a judge in Luxembourg, Professor Max Sørensen wrote an article entitled *Brückenbau und Durchfahrten in Meerengen* published in

Festschrift für Eberhard Menzel, Duncker und Humbolt, Berlin 1975, pp 551-563. The conclusions embodied in the above quoted legal opinions were included in that article which, however, contains some further thoughts as to future developments, including the aspect of drilling platforms. The pertinent sections of the article read as follows:

> ".... On the other hand, there is also general agreement that it is not possible, and therefore not necessary, to take into account unknown developments of the future. Once the bridge is there, future ship constructions will have to be adapted to it. A certain principle of priorities can be adopted for this purpose(81).
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> Modern technology has posed a delicate problem in the past few years. Drilling platforms for the extraction of oil and gas from the continental shelf are towed with their extremely high constructions, but floating, from one field to the other. In the event of plans to tow such a gigantic structure through the straits, is it possible then to assert a right of passage, unobstructed by bridges?
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> The considerations and preparatory work seem to indicate a reply in the negative. It is true that an explicit interpretation is non-existent, but all legal analyses take into account ordinary navigation only. Customary international law could hardly be deemed to deal with this new problem. At any rate, there is no rule of international law which imposes an obligation to draw parallels between such constructions and ships. It might be a different situation if a conventional ship,

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[81] This statement is construed by Finland as representing a transformation from a factual necessity into a legal principle of priority contradicting the statement by the Court in its Order of 29 July 1991 (para. 419 of the Memorial). This construction is without foundation. The statement of Professor Max Sørensen presupposes of course that the building of the bridge at the time of its construction does not violate international law i.e., respects the existing navigation of ships in the strait.

> capable of moving under her own power, is provided with a derrick. Even under these circumstances, however, it remains doubtful whether it is a case of such navigational interests as are embraced by the right of innocent passage under customary international law. ...."

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598. As it appears from this analysis of the legal considerations given since 1936 to the construction of a fixed link across the Great Belt, the Government of Denmark considered itself to be on solid ground when passing the 1973 Act providing *inter alia* for a high-level bridge across the Eastern Channel of the Great Belt. The essential factors seen from the point of view of international law were *that* the bridge would cross an area lying within Denmark's territorial sea, *that* the horizontal and vertical clearances of the bridge would allow for continued navigation of the Belt as in the past, *that* floating objects under tow do not have to be taken into account in constructing the bridge.

599. It is to be noted that in planning a *high-level* bridge, mention has never been made, neither in the Governmental Reports (1960 and 1968) nor in the Acts passed (1973 and 1987) of any possibility of inserting an opening in the bridge. The Reports and the Acts have been published and thus made accessible to any Government concerned. All drawings of plans for a high-level bridge across the Eastern Channel show a bridge without an opening part (Figure 1). Thus, there is no basis for assuming that a bridge-opening was contemplated. If that had been the case, the limitation in height would have ceased to have any importance. Indeed, the whole purpose of a *high-level* bridge is to avoid the need for an opening.

600. It is further to be noted that floating objects such as jack-ups and semi-submersibles have, when occasionally passing the Danish straits, always been under tow or transported on heavy-lift ships and are expected to continue to be so. Such structures cannot,

therefore, claim to be navigating the Danish straits as ships enjoying the right of innocent passage.

601. As shown in this Chapter it has continuously been the opinion of successive Danish Governments that the Fixed Link across the Great Belt as planned and currently under construction respects the interests of the international community, which furthermore has been kept fully informed about Denmark's plans.

602. The extensive Danish deliberations given to the Great Belt Project seen from the point of view of international law have for obvious reasons centred around the right of passage of existing ships. Finland claims that this right extends *inter alia* to oil rigs, special ships, and reasonably foreseeable ships. In the view of the Government of Denmark this claim is not warranted as will be explained in the following Chapter.

CHAPTER III.

SHIPS IN INTERNATIONAL LAW

A. MODUs Compared to Ships

603. Offshore drilling is an industrial activity which has developed relatively recently as an extension of exploration for and exploitation of hydrocarbons on land. The machinery used for offshore drilling is basically the same as that used on land except that it is installed on platforms, and in a few cases on ships, as described in Part I, Chapter V, B.

604. The origin of the present dispute between Finland and Denmark stems from a differing interpretation of the term "ship" in the relevant rules of international law governing the right of passage through the Danish straits. Finland maintains that all mobile offshore drilling units (MODUs) have the right of unimpeded passage while Denmark has consistently taken the position that this right is limited to ships in the traditional understanding of this term.

605. As pointed out in the Memorial (para. 444) there is no generally accepted definition of the term "ship" for either international law or municipal law purposes. In the words of one of the authorities on international law "..... (t)he term "ship" is used with different meanings in different contexts depending on the purpose and may be inclusive or exclusive of objects from one context to another...".[82]

606. In the conventional understanding the term, "ship" is characterized by certain features, among them a hollow structure, a capacity to navigate independently, and an appearance that corresponds to the usual idea of what a ship should look like. Other features of importance are that its purpose should be to transport

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[82] D.P. O'Connell, *The International Law of the Sea*, Vol. II, 1984, pp. 747-748.

persons or goods and that it should move with frequency. MODUs do not correspond to these criteria with the possible exception of drill ships although their purpose is not the same as that of conventional ships. This understanding indeed appears to be shared by Finland in so far as the Finnish submission makes a distinction between an existing right of passage through the Great Belt applicable "to all ships" and the same right to be *extended* to MODUs, other special ships and reasonably foreseeable ships (para. 560 (a) and (b) of the Memorial).

607. The understanding of the concept "ship" is treated by a leading Scandinavian expert on maritime law, Professor Sjur Brækhus in an article in the Norwegian periodical MARIUS No. 3, Oslo, September 1975, (Annex 74). In this article Professor Brækhus debates *inter alia* the question of whether drilling platforms can be considered ships. He points out that movable platforms without their own machinery for propulsion (jack-ups) cannot be regarded as ships. The case of movable platforms with their own machinery for propulsion (semi-submersibles) may raise some doubt, but Professor Brækhus reaches the conclusion that semi-submersibles cannot be considered ships. He points to the fact that their movements are of very minor importance compared to the time they spend at their main function which is carried out while firmly anchored. Moreover, many of the rules which apply to ships are not applicable to semi-submersibles.

608. In contrast to platforms Professor Brækhus concludes this part of his article by pointing out that drill ships should be considered ships in a legal context.

609. The uncertainty as to the legal treatment of MODUs is the background for the work which has been initiated by the Comité Maritime International (CMI), a non-governmental organization whose object is to contribute to the unification of maritime and commercial law. As appears from Annex 34 to the Memorial, CMI adopted a Draft Convention on Offshore Mobile Craft at its conference in Rio de Janeiro in 1977. The object of this Draft

Convention is to ensure that a number of international conventions enumerated in Articles 2 - 7 which apply to ships should also be applicable to offshore craft "to which they would not otherwise apply".

610. Article 8, second paragraph, in the Draft Convention expressly reserves the right of a State when enacting legislation to exclude craft which are not vessels from the application of such new legislation. As appears from Appendix 1 to Annex 34, page 168, of the Memorial, many States find it unacceptable to undertake restrictions in their future legislation by compelling them to treat ships and offshore craft identically. A proposal to this effect was rejected by the CMI.

611. The basic difference between drilling platforms and ships has also given rise to Article 9 of the Draft Convention, which deals with limits of liability for platforms. The problem is that, because of their shape, platforms are difficult to measure for tonnage under the rules used for ships, which basically measure the cubic feet of closed compartments. Applied to platforms this method results in too low a tonnage compared to the value of drilling units. In consequence, a fixed tonnage on platforms for limitation purposes has been proposed in Article 9, it being understood that such tonnage shall be substantially higher than that which would result from the ordinary measurement.

612. The differing view on how to treat MODUs is summed up by the sub-committee chairman of the CMI, Mr. Frode Ringdal, in his introductory report to the Legal Committee of IMCO (IMO) (Annex 36, appendix 1 to the Memorial, page 167), in the following words:

> "In many countries some or all of these craft are held to be ships and are treated legally as such. But as they frequently lack the ship shape and other ship characteristics - some times being self-propelled, at other times not - many states

hold them not to be ships. In such case there are normally no rules governing their maritime activity."

613. The necessity to distinguish between ships on one hand and offshore units on the other is confirmed by the practice of the Committee of Lloyd's Register of Shipping. Lloyd's Register maintains separate registers for ships and for offshore units (Annex 75).

614. This distinction has also been accepted by the International Maritime Organization (IMO) in its resolution A.550(13) of 17 November 1983 concerning Apportionment of Expenses Among Member States (Annex 76). According to this resolution expenses are divided among members and associate members on a dual basis: each member shall contribute a basic assessment in accordance with the percentage of its normal contribution to the United Nations; an additional assessment is determined by its gross register tonnage as shown in the latest edition of Lloyd's Register of Shipping. As stated above this Register does not include offshore units.

615. Considerable effort is made in the Memorial (paras. 445 - 477) to show that the definition of "ship" in a number of international conventions includes MODUs. The lack of a generally applicable definition has led to the practice that many conventions dealing with maritime matters define the scope of the kind of craft which are covered by the convention in question. These definitions vary from case to case, sometimes including certain kind of craft or installations, at other times excluding them or not specifying them. Moreover, such conventions invariably state that their provisions should be understood "for the purposes of this Convention" or "for the purposes of these Rules" thus limiting the extent of the definition to its application within the range of each convention. Consequently no conclusions or analogies can or should be drawn from these definitions as to the scope of the term "ship" used in other conventions.

616. To take but a few examples of the conventions cited in the Memorial, reference is made to paragraph 445 concerning The Convention for the Unification of Certain Rules relating to Bills of Lading for the Carriage of Goods by Sea, 1924, which stipulates:

> "ship" means any vessel used for the carriage of goods by sea".

617. Obviously MODUs would not be covered by this definition as they are not intended for the carriage of goods by sea but for drilling for hydrocarbons in the seabed.

618. In paragraph 459 of the Memorial the definition of "ship" in the 1986 UN Convention on the Conditions for Registration of Ships is quoted. Article 2 states that:

> "ship" means any self-propelled seagoing vessel used in international seaborne trade for the transport of goods, passengers or both with the exception of vessels of less than 500 gross registered tons".

619. This definition, which contains some of the essential elements of the normal description of "ship", does not include MODUs which are not used for the transport of goods or passengers.

620. In paragraph 460 of the Memorial it is mentioned that "perhaps the treaty definition most relevant to the present case is that given in the Regulations attached to the 1972 convention on the International Regulations for Preventing Collisions at Sea". Rule 3 of these Regulations state that:

> "For the purposes of these Rules except where the context otherwise requires (a) the word "vessel" includes every description of water craft, including non-displacement craft and seaplanes, used or capable of being used as a means of transportation on water".

621. As mentioned in paragraph 615 above this definition is typical for specialized conventions in limiting its definition to "the purposes of these rules" and no general conclusions can be drawn from it. The *ad hoc* character of the definition is further highlighted by the fact that the definition includes seaplanes which surely do not fall within the normal understanding of the term "vessel" or "ship".

622. Several conventions concerning oil pollution include in their definition of the term "ship" fixed platforms which cannot under any circumstances be regarded as ships. This kind of expedient definition is found *inter alia* in the 1972 Oslo Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft, Article 19, and the 1973 International Convention for the Prevention of Pollution from Ships, Article 2 (paras. 456 and 457 of the Memorial). Both conventions expressly state that their definitions should be understood as being for the purpose of the particular Convention.

623. The same kind of *ad hoc* solution is found in the "Agreement between the Government of the Kingdom of Denmark and the Government of the German Democratic Republic concerning Salvage Operations in the Internal Waters and Territorial Seas of the Kingdom of Denmark and the German Democratic Republic" referred to in paragraph 464 of the Memorial. Article 1 of the Agreement states:

> "For the purposes of this Agreement: 1. "Ship" means a vessel of any type which is used at sea, including hydrofoil boats, air cushion vehicles, submarines, floating vessels and fixed and floating platforms".

624. Once again this definition is only meant to be valid "for the purposes of this Agreement" which is to ensure that salvage operations can be carried out in relation to a wide range of craft and installations including fixed platforms.

625. The question of the definition of ships in national legislation is treated in the Memorial from paragraph 479 to paragraph 503. In the same way as in the foregoing paragraphs concerning treaty practice, an attempt is made to draw conclusions from national legislation. This attempt is bound to fail because national legislation, like treaty practice, varies from case to case and is determined by the purpose to be obtained by the individual type of legislation. A case in point, paragraph 486 of the Memorial, states that some pieces of national legislation refer to a "vessel capable to navigate" while others cover vessels "used in navigation". The memorandum goes on to point out quite rightly that this distinction is not maintained with any consistency in municipal law. The same could be said for decisions by municipal courts which may find it expedient to regard a wide range of craft, including MODUs, as ships for the purpose of one piece of legislation and not for another.

626. Paragraph 491 of the Memorial mentions that it is occasionally required that a vessel must be engaged in transport of goods and persons. It goes on to state that such legislation should not be taken to indicate that there is a general criterion requiring vessels to be used for transport of goods or persons in order to qualify as ships. As a matter of fact this is exactly one of the main criteria used to define a ship, see paragraphs 618 - 619 above. To be on the safe side, the Memorial states that MODUs would in any event fulfil this criterion because they are designed to transport drill rigs, accommodation units or other offshore equipment from place to place.

627. This characterization of MODUs bears no relation to the activity described by the words "transport of goods and persons". This criterion describes the normal activity of a ship plying its trade from harbour to harbour, not of platforms being conveyed to a site in the sea where they will remain stationary for any length of time for the purpose of drilling in the seabed.

628. In paragraph 492 of the Memorial the arbitrary nature of national legislation is once more apparent. Some countries consider means of propulsion as a necessary criterion for the definition of "ship" while the legislation of other countries does not.

629. The special characteristics of MODUs appear from Annex 36 to the Memorial from which the following instances are selected:

630. The Australian Maritime Safety Authority notes in a reply of 15 October 1991 that advance notification for passage of MODUs in Australian waters is required in certain circumstances, and that conditions may be imposed on a tow or a tow may be prohibited altogether for safety reasons.

631. From a reply of 18 October 1991 by the Ministry of Defence of Argentina it appears that MODUs are not included in the concept mentioned in the law of navigation and thus do not possess the juridical nature of vessels, nor can the law applied to vessels be applied in respect of them. A law granting MODUs a treatment *sui generis* is now being considered by the Congress.

632. Chile reports in a reply of 15 October 1991 from the Director General of the Sea Territory and the Merchant Navy that arrivals of MODUs in the Magellan Strait have to be notified at least 24 hours before the anticipated time of arrival. The use of pilotage is compulsory in the eastern sector of the strait.

633. In a reply of 30 October 1991 the Port of Singapore Authority states that MODUs with restricted ability to manoeuvre will have to comply with the International Collisions Regulation.

634. Malaysia reports height restrictions for MODUs in Penang Harbour in a letter of 15 October 1991 from the Secretary General of Transport.

B. Drilling Platforms

635. As pointed out in the foregoing, the natural understanding of the term "ship" excludes drilling platforms. Neither their construction nor their use is comparable to the normal shape and purpose of ships.

636. It is the Danish contention that only ships and not drilling platforms enjoy the right of unimpeded passage through the Danish straits. This position was made clear already in the Danish Circular Note of 12 May 1977 (Annex 12) which announced the construction of a bridge across the Great Belt with an elevation of 62 metres. In this Note it was stated that "(a)ccording to all available data the high-level bridge across the Eastern Channel will not in any way restrict passage through the Great Belt by existing ships which have navigated these waters in the past". The use of the word "ships" in this Note was quite deliberate.

637. Finland, which did not react to this Note, had no grounds to infer that there would be an opening in the bridge to allow for the passage of drilling platforms with a height exceeding 62 metres. This would have been an unprecedented feature in a high-level bridge, and plans of the bridge published at the time clearly showed that it was not so. As already indicated, the whole purpose of a high-level bridge is to avoid the need for an opening.

638. The Finnish platforms which had passed through the Danish straits until 1977 had all been towed, and none had navigated independently under their own power, and in Denmark's view, none of them qualified as "ships".

639. This continues to be the case for all drilling platforms, including semi-submersibles, because of their restricted ability to manoeuvre. The normal procedure for tows passing through the Danish straits is to use tugs with two pilots (Annex 32 to the Memorial). No Finnish built drill ships had passed through the Danish straits at the time of the notification of the planned bridge.

640. The Note of 12 May 1977 did not imply that Denmark objects to the passage of drilling platforms through its straits. But Denmark cannot accept that there is an unlimited right of passage for all craft irrespective of height that would prevent the construction of a bridge across the Great Belt as long as the passage of normal shipping is not interfered with.

641. Jack-ups and semi-submersibles which cannot themselves claim unimpeded passage through the Danish straits do not obtain this right by carriage on heavy-lift transport ships. Commercial ships normally have a right of passage with their cargo, but common sense dictates that there are limits to the dimension of the cargo as far as the relevant rules of unimpeded passage are concerned. The right of innocent passage is directed towards the navigating units i.e., the ships, not their cargo. The construction of a bridge would not be possible if one had to take into account any oversized cargo which ships might conceivably be able to carry. Platforms with towers or legs extending 150 metres or more exceed the limits of what may reasonably qualify as cargo attached to ships.

642. Heavy-lift ships are only used for transportation over very long distances, for instance across the Atlantic or Pacific Oceans. Operational costs for heavy-lift ships are up to 10 times higher than for ordinary towing which has normally been used for transport of MODUs through the Great Belt. Only two examples of the use of heavy-lift ships are known for the transport of jack-ups through the Great Belt. In both cases the jack-ups could have been towed by tug boats through the Sound before being placed on heavy-lift ships.

643. All crane ships can pass the East Bridge with the exception of one vessel which has never used the Danish straits, (Report from Lloyd's Register of Shipping, Annex 35). As it appears from this Report, three semi-submersible crane vessels are too high to pass the East Bridge and have too deep a draught to pass through the Sound. However, they cannot be regarded as ships and therefore cannot claim unimpeded passage.

C. Ships with Special Characteristics

644. Drill ships must be considered as ships with special characteristics due to their particular purpose and equipment with a drilling tower.

645. In exercising the option granted in Article 1, Section 1 of the 1857 Treaty, which refers to passage through the Sound *or* the Belts, Denmark must be entitled to require that drill ships shall exercise their right of passage through the Sound and not through the Great Belt. The right of the coastal State to direct ships with special characteristics to use such sea lanes and traffic separation schemes as it may designate is recognized in Article 22 of the Law of the Sea Convention of 1982. This Article is considered a codification of customary law and used by coastal States to ensure regulations dictated by common sense and navigational necessity.

646. All drill ships are able to pass through the Sound via the Drogden Channel. Seventy-five per cent. of the drill ships can pass fully loaded, while the remaining can pass partly loaded which is quite normal for a drill ship in transit (Report from Lloyd's Register of Shipping, Annex 35). The three drill ships which were built by *Rauma-Repola Offshore Oy* in 1981/82 all had a transit draught of 7.3 metres and may thus pass through the Sound.

D. Applicable Conventions

647. In the preceding sections, A and B, the Finnish attempt to equate MODUs with ships has been countered on its own premises, which are primarily centred around international conventions and national legislation that has nothing to do with the passage of ships through a State's territorial sea, including international straits. Surprisingly enough, Finland does not enter into a discussion on the applicable and relevant conventions dealing with the right of innocent passage.

648. As pointed out in greater detail in the following Chapter, the rules of international law applicable to the right of innocent passage through the Danish straits are the Treaty of 1857 for the Redemption of the Sound Dues and the 1958 Convention on the Territorial Sea and the Contiguous Zone.

649. The 1857 Treaty for the Redemption of the Sound Dues is only applicable to *merchant ships* and cannot be interpreted to encompass MODUs, which are not merchant ships and did not exist at the time of the adoption of the Treaty.

650. The 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, Article 16, paragraph 4, states that there shall be no suspension of the innocent passage of foreign *ships* through straits used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State. There is nothing in the Convention or its *travaux préparatoires* to indicate that the term "ship" should cover anything else than ships proper. The term cannot therefore be extended to cover special constructions such as MODUs.

651. This opinion has on several occasions been expressed by Professor Max Sørensen in connection with the long standing plans to build bridges across the Danish straits, see the preceding Chapter II. As Head of the Danish Delegation to the First United Nations Conference on the Law of the Sea in 1958 Professor

Sørensen had a close knowledge of the preparations for and the proceedings in that Conference. It was his opinion that there is nothing to indicate that the relevant provisions in the Convention on the Territorial Sea and Contiguous Zone of 1958 intended to change the rule of customary law which allows for passage of conventional ships only.

652. The Swedish Government has taken the same position as Denmark in relation to its right to construct a bridge in Swedish territorial waters in the Sound. This was confirmed recently in a statement by the Swedish delegate, Mr. Löfmarck, at the meeting held in the IMO on 10 June 1991 (Annex 29 to the Memorial, p. 128). The Swedish delegate stated on this occasion that the building of a bridge in the Swedish part of the Sound of a height of some 50 metres would not allow for passage of platforms but that it was considered that the bridge would not be an impediment to navigation either today or in the future. As mentioned in paragraph 359 the fixed link across the Sound on the Danish side will consist of an immersed tunnel under the Drogden Channel leaving the existing conditions of navigation unaffected.

653. As demonstrated in Chapter IV.A.3, Part III of the 1982 Convention on the Law of the Sea concerning Straits Used for International Navigation does not apply to the Danish straits in virtue of Article 35 of the Convention. It is noticeable, however, that in describing the right of transit passage in Part III, Section 2, the Convention uses the term "ships" unchanged from Article 16, paragraph 4 of the 1958 Geneva Convention. Although offshore constructions had come into general use at the time of the negotiations in the Third United Nations Conference on the Law of the Sea, no attempt was made to specify the kind of craft encompassed by Part III, Section 2.

654. This is in contrast to Article 1 of the 1982 Convention entitled "use of terms and scope" paragraph (5) (a) which states that "dumping" means:

> "(i) any deliberate disposal of wastes or other matter from vessels, aircraft, platforms or other man-made structures at Sea;".

This paragraph shows that the Convention makes a clear distinction between "vessels" (which are synonymous with "ships") and platforms and other man-made structures. There is no foundation for interpreting the term "ship" in Part III, Section 2, on transit passage as encompassing drilling platforms. Article 1 of the Convention points to the opposite conclusion.

E. Future Ships

655. The Finnish contention that the right of passage through the Great Belt extends to reasonably foreseeable ships presupposes that there is an unlimited and elastic right of passage through the Danish straits. No rule of international law obliges Denmark to do more than to provide for the unhampered passage of ships as in the past. Once the bridge is in place, future ship constructions will take account of the height of the bridge.

656. It should also be considered that in assessing whether a given strait is an international strait or not, an important element of time is involved. This means that the strait in question must be used for international navigation at the time of the assessment. This requirement can only be fulfilled by ships *in existence* when the assessment is made. It follows that in planning for the Fixed Link across the Great Belt, Denmark only has to take into account ships that actually use or have used the Great Belt up to the time when the Fixed Link was decided upon.

657. In point of fact all the ships which have used the Danish straits up till now will be able to do so in the future. Based on existing designs for future ships, even reasonably forseeable ships will be able to pass under the East Bridge.

CHAPTER IV.

CURRENT LEGAL CONSIDERATIONS

A. Treaty Law and Customary International Law

658. In its Memorial, paragraph 376, Finland contends *that* its alleged right of passage is based on rules which are "both conventional and customary in nature", *that* none of these rules is such as to exclude, or to exclude wholly, the applicability of the others, and *that* each of them - even taken separately - is sufficient to uphold the Finnish claim. The conventional rules are, according to paragraph 378, the 1857 Copenhagen Treaty on the Redemption of the Sound Dues, the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone and to some extent the 1982 United Nations Convention on the Law of the Sea.

659. Denmark does not deny that the rules governing the right of passage through the Danish straits are "both conventional and customary in nature".

660. Denmark submits, however, that no absolute, unlimited and elastic right of passage through the Danish straits in general or through the Great Belt in particular as claimed by Finland can be deduced from any of the rules upon which the Finnish claim is based or from any other rule of international law.

1. THE 1857 TREATIES FOR THE REDEMPTION OF THE SOUND DUES

661. Basically, as reflected in Article 35 (c) of the 1982 Convention on the Law of the Sea, the Danish straits are governed by treaties of long standing. These are the multilateral Treaty for the Redemption of the Sound Dues between Denmark and *Austria, Belgium, France, Great Britain, Hanover, The Hansa Towns, Mecklenburg-Schwerin, the Netherlands, Oldenburg, Prussia, Russia*

and *Sweden/Norway*, signed at Copenhagen on 14 March 1857, and the bilateral treaties for the same purpose between Denmark and the *United States*, signed at Washington D.C., 11 April 1857, *Sardinia*, signed at Berlin, 25 November 1857, *Sicily*, signed at Copenhagen, 2 January 1858, *Toscana*, signed at Paris, 22 April 1858, *Venezuela*, signed at Caracas, 18 July 1858, *Portugal*, signed at Lisbon, 12 November 1858, *Turkey*, signed at Constantinople, 15 March 1859, *Spain*, signed at Madrid, 25 February 1860, respectively[83].

General Analysis of the 1857 Treaties

662. The Treaty of 14 March 1857 for the Redemption of the Sound Dues states in the Preamble that its object and purpose is "to facilitate and to increase the commercial and maritime relations at present existing between the contracting States or through them ... by the complete and permanent removal of all dues levied on foreign ships and their cargoes on their passage through the Sound and the Belts, ...".

663. Article 1 of the Treaty contains the stipulations concerning the abolition of the Sound and Belt dues. By Section 1, the King of Denmark undertakes not to levy any customs or tonnage dues, light or lighthouse dues, moorage dues or any other ship or cargo dues whatsoever on ships passing through the Belts or the Sound on their way from the North Sea to the Baltic or vice versa, whether they only sail through Danish waters or whether the conditions of the sea or commercial operations render it necessary for them to drop anchor or enter port. Section 1 goes on to stipulate that no ship in the future shall under any pretext whatsoever be subjected to any detention or hindrance in its passage of the Sound or the Belts, and *in the same sentence* it is provided that the King of Denmark expressly reserves himself the right by special agreements, not implying visit or detention, to regulate customs treatment of ships of States which are not Parties to the Treaty. By

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[83] *Danske Traktater efter 1800.*

Section 2, the King of Denmark furthermore undertakes not to try to reintroduce indirectly the abolished dues by means of new or increased port taxes or the like.

664. By Article 2 of the Copenhagen Treaty, the King of Denmark undertakes a number of *other* responsibilities distinct from the abolition of the Sound and Belt dues. Sections 1 and 2 deal with the conservation and maintenance as hitherto of the lighting and marking without charge of the waters of the Kattegat, the Sound and the Belts. Section 3 stipulates the duty in the future to watch over as hitherto the pilotage service, the utilization of which in the Kattegat, the Sound and the Belts shall be voluntary and carried out in return for a moderate charge, to be the same for Danish and foreign ships. Section 4 deals with the right of foreign contractors to station tugs in the Sound and the Belts. Section 5 and 6 deal with transit dues on transport by roads or canals between the North Sea and the Baltic. Finally, Section 7 deals with special arrangements concerning maintenance of lighting in the Sound and the Kattegat to be entered into with Sweden/Norway.

665. Article 3 requires that Articles 1 and 2 shall enter into force on 1 April 1857.

666. Articles 4, 5 and 6 deal with the payment of compensation to the King of Denmark for the sacrifices imposed by the stipulations of the Treaty.

667. Articles 7 and 8 contain stipulations concerning the execution of the Treaty in accordance with the constitutional rules of the Contracting Parties and concerning ratification of the Treaty.

668. The separate bilateral treaties on the Redemption of the Sound Dues follow the same scheme as the Copenhagen Treaty, though to some extent phrased differently compared with that Treaty. The bilateral treaties also provide for the abolition of the Sound Dues in return for a compensation to Denmark once and for all, and furthermore stipulate a special régime in the Sound and the

Belts similar to Article 2 of the Copenhagen Treaty. Nothing suggests an interpretation of the bilateral treaties different from the interpretation of the Copenhagen Treaty.

669. For a detailed description of the origin and history of the Sound Dues, levied by Denmark on foreign vessels passing through the Sound and the Belts, reference is made to the treatise by Dr. Erik Brüel, *International Straits* and to paragraphs 554 - 560 of this Counter-Memorial.

670. By the Copenhagen Treaty of 14 March 1857 and the bilateral treaties for the same purpose, the special rights exercised by Denmark were terminated, the result being that the legal position of the Danish straits thereafter was regulated by the special régime stipulated in Article 2 of the Copenhagen Treaty, supplemented by the customary rules of international law related to the Danish straits.

671. This interpretation, which is supported by Danish as well as foreign writers, follows naturally from the wording as well as from the whole structure of the Copenhagen Treaty[84]. Article 1 of the Treaty deals exclusively with the abolition of the dues on merchant ships and their cargoes, while Article 2 deals with other responsibilities undertaken by Denmark, distinct from the abolition of the dues. The sentence stipulating that "no ship shall henceforth, under any pretext whatsoever, be subjected in its passage of the Sound or the Belts to any detention or hindrance" originates from a draft submitted by France, Great Britain and Prussia to the Conference on the Redemption of the Sound Dues on 3 February 1857. It was not included in the original Danish proposal of 2 February 1856. The object and purpose of including the said stipulation, which was accepted by Denmark, was to obtain "abandonment of status quo, not only in relation to ships from States which, like the Contracting States, undertake to pay a

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[84] See Erik Brüel, *International Straits*, Vol. II, p. 40 note 3.

compensation but also in relation to ships from States which do not undertake any obligation whatsoever, and which might never persuade themselves to do so." (Statement by the Danish Commissioner during the meeting of the Conference on 16 February 1857, included in the Protocol of that meeting - *Historisk Tidsskrift* 3.1, Copenhagen (1858 - 1859), pp. 526 - 527, Annex 77). The sentence is placed in the middle of Article 1, between the stipulation concerning the abolition of the dues and the stipulation containing the reservation of the right to regulate by special agreements customs treatment of ships belonging to States which are not Parties to the Treaty. Thus, there can be no doubt that this particular sentence, relating in its origin only to fiscal matters, cannot provide the basis for an interpretation designed to limit the sovereign rights of Denmark over the Danish straits in any way that does not follow from the general rules of international law concerning innocent passage through the territorial sea as later codified in the 1958 Convention on the Territorial Sea and the Contiguous Zone, supplemented by the special régime contained in the rules of Article 2 of the Copenhagen Treaty.

Scope of the Treaties

672. The geographical scope of the right of passage for foreign ships established by the 1857 Treaties is described as a right of passage for ships passing "through the Sound or the Belts".

673. It should be noted that Chapter I in Part III of the Memorial deals with the rules governing the right of passage "through the Great Belt". As elsewhere in the Memorial, Finland attempts to focus exclusively on the Great Belt instead of on the whole integrated system of the Danish straits.

674. The Danish straits, in respect of which there is a right of passage, are not constituted by the Great Belt only. Geographically, it is an integrated system of straits as the Memorial recognizes at page 12, paragraphs 5 and 6.

675. The Copenhagen Treaty for the Redemption of the Sound Dues provides in its Article 1, Section 1, that Denmark undertakes not to levy any charge whatsoever on ships "passing through the Belts or the Sound", adding the provision upon which Finland fundamentally relies:

> "No vessel shall henceforth, under any pretext whatsoever, be subjected in its passage of the Sound or the Belts to any detention or hindrance".

676. These provisions confirm, from a legal point of view, the geographical facts: the international Danish straits in respect of which there is a right of passage are not constituted only by the Great Belt.

677. It follows that the obligation of allowing passage, undertaken by Denmark is fulfilled equally whenever the passage may be safely completed through the Sound. In other terms, there is a right of passage through the Danish straits; there is not an exclusive and specific right of passage through the Great Belt.

678. The use of the alternative "or" in the Copenhagen Treaty, in relation to passage through the Belts or the Sound signifies that the obligation may be fulfilled by using one or the other seaways, and that there is a choice.

679. As stated in paragraph 645 the established customary law in general, codified in Article 22 of the 1982 Convention on the Law of the Sea, and that established for the Danish straits in particular authorizes, in very special circumstances, the territorial State to make that choice as to which of the seaways shall be used.

680. It results from the definition in the Preamble of the object and purpose of the Copenhagen Treaty that its provisions concern merchant ships. This follows directly from the vocabulary used in the Preamble - "foreign ships and their cargoes" - and the reference to "commercial relations".

681. Oil rigs and drilling platforms were of course unknown at the time when the Treaty was concluded. They cannot be described as merchant ships or ships in the traditional sense of that term as shown in Chapter III. Consequently, such structures fall outside the scope of the Treaty.

682. As far as ships in the traditional understanding of this term are concerned, the Parties to the Copenhagen Treaty as well as the international community at large have acquiesced in a vertical clearance of 65 metres as being sufficient for the exercise of their right of passage, thus denying the existence of an absolute, unlimited, and expanding right of passage.

Finland as a Third Party Beneficiary to the Copenhagen Treaty

683. Denmark agrees that the rights provided in the Copenhagen Treaty were accorded to ships of all States, not only to ships belonging to the Parties of the Treaty, but also to ships from third States.

684. Finland is not a Party to the Copenhagen Treaty. It may, however, invoke the Treaty as a third party beneficiary in accordance with Article 36 of the Vienna Convention on the Law of Treaties. This legal situation as a third party has been conceded by Finland in its Memorial, paragraphs 380 - 381.

685. As a third party beneficiary Finland cannot, however, claim or exercise more extensive rights than those enjoyed and claimed by the actual Parties to the Copenhagen Treaty.

686. The Parties to the Treaty have acquiesced in a vertical clearance of 65 metres as being sufficient for the exercise of their right of passage through the Danish territorial sea, thus denying the existence of an absolute, unlimited and expanding or elastic right of passage and accepting Denmark's right to build a bridge with such a clearance. Finland cannot invoke additional rights or a more favourable treatment than that agreed by the actual Parties to the

Copenhagen Treaty. There cannot be two different measures for the right of passage; an elastic or expanding one for Finland, up to 180 metres high or beyond, and another for the Parties, 65 metres high.

687. The above consideration is based on the letter and the spirit of Article 36 of the Vienna Convention on the Law of Treaties, an article which deals with "treaties providing for rights for third States".

688. According to paragraph 1 of this Article "a right arises for a third State from a provision of a treaty if the Parties to the treaty intend the provision to accord *that right*" to the third State (Italics added). This is the case here; the Parties of the Copenhagen Treaty intended to confer a right of passage in favour, not just of themselves, but of all States. Now, what is granted to the third State is exactly the same right, "that right" obtained by the Parties, in this case a right of passage with a vertical clearance of 65 metres.

689. The subordination of the right of the third State to the actual conditions obtained by the Parties is confirmed by paragraph 2 of Article 36 of the Convention on the Law of Treaties, which provides that "a State exercising a right in accordance with paragraph 1 shall comply with the conditions for its exercise provided for in the treaty, or *established in conformity with the treaty*" (Italics added).

690. Once Denmark has established as the condition for vertical clearance a height of 65 metres, and the existence of a bridge with such clearance has been agreed, expressly or tacitly, by the Parties to the Treaty, then such a regulation becomes binding on Finland, as a condition "established in conformity with the Treaty", and not as an unlawful restriction of its rights.

691. Finland has opposed this line of reasoning saying in the Memorial, paragraph 415, that the Parties to the Copenhagen Treaty cannot by tacit consent revoke a third party beneficiary's treaty rights under Article 37 (2) of the Convention.

692. The answer to this observation is that the right of passage derived from the Treaty was not revoked by the Parties when they accepted a 65 metres clearance; they merely agreed that their right of passage could be satisfactorily exercised within that limit.

693. It follows that the Parties did not deprive Finland of the rights it derives from the treaty stipulations in its favour resulting from the Copenhagen Treaty. But Finland cannot claim or exercise its rights in a more extensive way than is exercised by the actual Parties. There cannot be two different measures for the right of passage.

694. Finland must adjust its conduct and the exercise of its rights to the conditions agreed upon by the Parties, which have denied the existence of an absolute, unlimited, and expanding or elastic right of passage and acquiesced in the existence of a bridge with a height of 65 metres.

The Copenhagen Treaty does not Create an "Objective Régime"

695. Finland further contends in paragraph 382 of the Memorial that "the Copenhagen Treaty creates an objective régime, in other words a set of rules which may be invoked by all interested states, independently of their being parties to the treaty.". In support of this contention, reference is made to a legal opinion from 1920 concerning the demilitarization of the *Åland Islands* by the International Committee of Jurists established in 1920 by the Council of the League of Nations.

696. The idea that in contemporary international law a so-called "objective régime" or an "international settlement" such as the demilitarization of the *Åland Islands* may be imposed on non-parties by means of a treaty between certain States only was rejected by the International Law Commission during the preparation of the Convention on the Law of Treaties. The Special Rapporteur, Sir Humphrey Waldock, had proposed to incorporate

that concept, although with hesitation, but a large majority of the members rejected the proposal.

697. The main objection was that the concept of "objective régimes" was regarded as an approval of *de facto* legislation or of government of the world by the Great Powers, for objective régimes had in fact been used in the past to impose certain conditions on small States at a time when the sovereign equality of States had not been much respected. Also, from a juridical point of view, it was considered incorrect to say that treaties could, of themselves, create an objective régime, (Deliberations of the International Law Commission, *I.L.C. Yearbook* 1964, Vol. I, pp. 96 - 109, reproduced in Annex 78).

698. The International Law Commission decided, in the light of the discussion, and at the initiative of the Special Rapporteur, to withdraw the proposed article and agreed that such matters as right of passage over maritime waterways or rivers were to be covered by the article concerning treaty stipulations in favour of third States. (*I.L.C. Yearbook 1964, Vol. I*, p. 105, para. 68).

699. This decision was confirmed by the Vienna Conference on the Law of Treaties, which rejected an amendment introduced by Professor Castrén of Finland. The main reason invoked for rejecting the Finnish amendment and supporting the Commission's proposal was that Article 36 on treaties providing for rights of third States, was the legal basis for treaty provisions establishing freedom of navigation and right of passage for all states through maritime waterways. (*United Nations Conference on the Law of Treaties, First Session, Official Records, 35th Meeting of the Committee of the Whole*, paras. 13 - 43, especially paras 20, 21, 38, 39, 43. - Annex 79).

2. THE 1958 GENEVA CONVENTION ON THE TERRITORIAL SEA AND THE CONTIGUOUS ZONE

700. The Geneva Convention of 1958 on the Territorial Sea and the Contiguous Zone is the second applicable treaty, having been ratified by both Parties in 1965 (Finland) and in 1968 (Denmark).

701. The provisions in Section III of the 1958 Convention on the right of innocent passage apply, like the provisions of the 1857 Copenhagen Treaty, to ships of all States. There is no foundation for interpreting the term "ship" in Section III as applying to other structures than ships in the traditional sense of the term.

702. Furthermore, the Convention defines "passage" as "navigation ..." (Article 14, paragraph 2) and "ordinary navigation ..." (Article 14, paragraph 3). In Article 16, paragraph 4 on straits the expression "international navigation ..." is used. The same terminology is used in the 1982 Convention, Articles 18, paragraphs 1 - 2 and Article 34.

703. No generally accepted definition exists in international law of the term "navigation".

704. Common sense would suggest that what is envisaged is *normal traffic*, regularly moving both ways, as a means of communication in the interest of international relations, first and foremost trade relations, between various parts of the world; whereas the occasional movement of floating objects such as MODUs cannot be covered by that concept. Movements of that kind do not represent a case of such navigational interests as are embraced by the right of innocent passage (Max Sørensen in *Brückenbau und Durchfahrten in Meerengen*, as referred to in para. 597 above). This is particularly true with regard to the Finnish drilling platforms which have all passed through the Danish straits under tow or on heavy-lift ships.

705. The 1958 Geneva Convention contains only one single provision specifically dealing with the régime of straits, namely Article 16, paragraph 4, forbidding suspension of the right of innocent passage of foreign ships in straits used for international navigation. This provision, a codification of customary law as defined by the International Court of Justice in the *Corfu Channel* case, is, however, not relevant to the present dispute.

706. With that exception, the 1958 Convention does not deal directly with passage of ships through straits. This matter is governed by the same rules which are applicable to innocent passage of ships through the territorial sea. Thus, passage through straits is a derivative and incidental corollary of innocent passage through the territorial sea. It is significant, too, that the only reference to international straits is to be found in a convention dealing with the territorial sea and as part of the article regulating innocent passage in the territorial sea, whereas no reference to international straits exists in the 1958 Convention on the High Seas.

707. Finland wants to avoid the 1958 Convention, arguing at paragraph 395 of the Memorial that "present day customary law on passage through straits does not correspond any longer with the prescriptions of the Geneva Convention", meaning that it was applied in practice more liberally than the letter of the Convention provides for.

708. However, the record of the discussions at the United Nations Sea-Bed Committee, established in 1968 by General Assembly Resolutions 2467 A, B, C, and D (XXIII) and at the Third United Nations Conference on the Law of the Sea shows exactly the opposite. The practice of States had been so restrictive, consisting of a strict application by the coastal States of the provisions of the 1958 Convention, that the maritime States succeeded in correcting and improving in the 1982 Convention what they described as the ambiguities and inadequacies of the régime of passage through straits. To that effect, the consensus reached at the Conference incorporated, in Part III of the 1982 Convention, a

novel right of transit passage through straits based on the principle of freedom of navigation.

Differences between the 1958 Geneva Convention and the 1982 Convention on the Law of the Sea

709. Leaving aside the question of the passage of aircraft, warships and submarines, *other differences between the 1958 text and the 1982 Convention* reveal the deficiencies and practices that UNCLOS III wanted to correct and improve in the application of the 1958 régime.

710. One of these corrections relates to the scope of the regulatory competence enjoyed by the coastal State. According to the Geneva Convention the bordering State has under Article 14, paragraph 5 and Article 17 a broad prescriptive power to issue laws and regulations defining what constitutes innocent passage, without the need to refer only to certain subject matters. Thus, the regulatory competence of the coastal State includes, under the 1958 Convention, the power of fixing reasonable clearance limits.

711. A comparison of the scope of this regulatory competence shows that in 1982, for the transit passage, the prescriptive power of the coastal State has been drastically reduced.

712. For instance, Article 42, paragraph 1 of the 1982 Convention enumerates exhaustively the subject-matters which may be regulated by the littoral State: safety of navigation, fisheries, control of pollution, control of customs and immigration. And also, in respect of certain subjects, the coastal State is obliged to give effect to applicable international regulations, and in some cases these regulations have to be agreed by the competent international organization.

713. The regulations as to innocent passage that have been issued by Denmark in the exercise of its regulatory power are undoubtedly restrictive but fully reasonable (paras. 568 - 578

above). They take into account the introduction, in respect of innocent passage, of the new notion of "special characteristics of particular ships" as a ground justifying a non-discriminatory but different treatment for certain categories of ships. This notion, introduced in Article 22 in Part II of the 1982 Convention, is designed to take due account of scientific and technological developments which have occurred in recent years. These changes required the adoption of appropriate rules to regulate navigation of certain ships with special characteristics.

714. Among these are mentioned in Article 22 in Part II of the 1982 Convention tankers, nuclear powered ships and ships carrying nuclear or other inherently dangerous or noxious substances[85].

715. The reference to ships of special characteristics envisages the applicability of differential treatment to certain categories of ships. Drill ships and heavy-lift ships with their extraordinary cargo (jack-ups) would naturally fall within this category of ships. Obviously, the Finnish oil rigs and similar artifacts, even if they were considered ships, would fall within the *non-exhaustive* category of ships with special characteristics, requiring special treatment for their passage. In this connection it should be recalled that drilling platforms have never been navigating the Danish straits. They are towed through or transported on heavy-lift ships.

716. Exceptional structures and platforms cannot have all obstacles up to 180 metres high magically disappear at their passage. If their builders want them to pass through the Great Belt,

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[85] Tankers were not expressly mentioned in the original draft considered by the Sea-Bed Committee in 1973 (Document A/AC.138/5cII/L.18). H.E. Judge Oda pointed out, however, in his comprehensive account of the work of the Sea-Bed Committee, that tankers would also fall within the category of "ships with special characteristics" *(The Law of the Sea in Our Time, II, The United Nations Seabed Committee*, 1968-1973, Sijthoff, Leiden 1977, p. 247).

they should erect their additional gear, towers, columns, jack-up legs, etc. after having passed under the bridge.

717. Another important difference between the 1958 Convention and the 1982 Convention is that in the Geneva Convention the coastal State has direct enforcement powers over foreign ships and as Article 16, paragraph 1 says, it "may take the necessary steps in its territorial sea to prevent passage that is not innocent".

718. This provision was described at the Conference by the representative of the United States, J.N. Moore as "(m)ost indicative of an intent to give coastal States certain rights to take unilateral action to prevent non-innocent passage" (J.N. Moore, *The Régime of Straits and UNCLOS*, American Journal of International Law, 1980, p. 102).

719. This direct enforcement power over a foreign ship has disappeared in the 1982 régime of transit passage, where, as described by Professor Caminos ".... ships in transit cannot be seized, refused passage, subjected to inspection or any other type of control that would impair transit passage. The only exception ... occurs when a violation ... causes or threatens major damage to the marine environment of the Strait. Then, and only then, may the State bordering the strait take "appropriate enforcement measures" (under Article 233) ...". (H. Caminos, *The Legal Régime of Straits in the 1982 United Nations Convention on the Law of the Sea*, Académie de Droit International, Recueil des Cours 1987 V, p. 169).

720. Still another difference between the 1958 and the 1982 régime is that the 1982 Convention in Part III recognized the right of transit passage "to all ships and aircraft", see Article 38.

721. It has been said that this granting clause in the 1982 Convention, "... perhaps the most important phrase from the standpoint of the user State ... makes no distinction between

categories of ships and aircraft, their nationality or ownership, their status as warship or merchant ship, or civil or State aircraft. The right of transit passage [in Part III], therefore, applies literally to all types of ships and aircraft, regardless of their individual characteristics ...". (Caminos *op. cit.*, p. 144).

722. All this cannot be said of the 1958 Convention. This fundamental difference is reflected in the terminology employed; innocent passage for "ships of all States" is the phrase used in the 1958 Convention, Article 14, paragraph 1. In the 1982 Convention, the transit passage is for "all ships and aircraft".

723. This striking difference as to the placement of the word "all" in the definition of the right of passage between the two Conventions, has a significance of its own, in the carefully considered terminology of both Conventions. It signifies that, for the application of Article 38 of the 1982 Convention, among the various interpretations given to the word "ships" in different treaties, a wide interpretation of that term is to be applied, since the text refers to "all ships".

724. On the contrary, Article 14 of the 1958 Convention refers merely to "ships of all States". Consequently, a restrictive interpretation of that term "ship" is called for, taking into account not only the different terminology utilized, but also the principle that restrictions to the sovereignty of the State over its own territory, submerged or not, cannot be presumed and must be strictly interpreted.

725. The corollary to extract from the comparative study of the 1958 and the 1982 Conventions is that the discussions and conclusions at UNCLOS III revealed certain deficiencies of the 1958 Convention, demonstrating that from the point of view of the freedom of the high seas it was an instrument from which only an imperfect and not an absolute right could at best be inferred. States, in particular the maritime powers, were legitimately concerned with the possibility that coastal States could deny "innocent passage"

through straits used for international navigation based on matters such as flag, cargo or destination of the vessels.

3. THE INVOCATION OF PART III OF THE 1982 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

726. Finland, instead of taking into account the restrictions as to the right of passage resulting from the applicable 1958 Convention, invokes the broader provisions of Part III of the 1982 Convention, as reflecting "the present trend in customary law" which "can serve as an interpretation of the Geneva Convention" (para. 409 of the Memorial). In that way Finland picks and chooses which it considers the most favourable provisions of the 1857, 1958 and 1982 Conventions in order to build its absolute, unlimited, and expanding right, ignoring the limitations resulting from the applicable treaties.

727. In paragraphs 394 and 395 of the Memorial, Finland invokes Part III of the 1982 Convention on transit passage, as a trend in international practice towards the establishment of a customary rule on passage making such passage independent of the notion of "innocent passage".

728. It is true that the new régime of transit in Part III is much more liberal than the one governed by the provisions applicable to the Danish straits.

729. But Part III is not applicable to the Danish straits nor to the Finnish *Åland Straits*. Thus, Article 35 (c) of the 1982 Convention provides, under the title "Scope of this Part" that "Nothing in this Part affects:

> (c) the legal régime in straits in which passage is regulated in whole or in part by long-standing

> international conventions in force specifically relating to such straits.".

730. Professor Caminos, who was an attentive witness at UNCLOS III, as Deputy Director of its Secretariat, has written, in an interpretation of this provision, that:

> "Examples of conventional régimes thought to qualify under Article 35 (c) when the 1982 Convention was adopted were the Turkish Straits, (Dardanelles and Bosphorus), the Danish Straits, the Strait of Magellan and the Åland Straits". (Caminos *op.cit.*, pp. 130 - 131)[86].

731. Finland played, together with Denmark, a protagonist role in originating Article 35 (c), which excludes the right of transit passage from both Finnish and Danish strait régimes.

732. On 22 July 1974, Denmark and Finland co-sponsored an amendment to a United Kingdom proposal which was the basic text of what later became Part III of the Convention.

733. The joint Danish-Finnish amendment, reads as follows:

> ...
>
> "3. This article applies to any strait or other stretch of water which is more than six miles wide between the baselines, whatever its geographical name ....

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[86] Similar views are expressed by J.N. Moore, in *American Journal of International Law*, 1980, p. 114; by Dupuy-Vignes, in their *Traité du Nouveau Droit de la Mer*, Treves, pp. 790-791; by S.N. Nandan and D.H. Anderson in *A Commentary on Part III of the United Nations Convention on the Law of the Sea*, published in *British Year Book of International Law*, 1989, p. 176; by J.A. Yturriaga, in *Straits used for International Navigation*, Nijhoff, 1991, p. 292.

5. The provisions of Chapter II, Part III apply to straits used for international navigation not wider than six miles between the baselines".

... (*UNCLOS III, Official Records*, Volume III, p. 191. DOCUMENT A.Conf. 62/C.2/L.15).

734. The joint amendment had the effect of excluding from the novel concept of transit passage the Danish and the Finnish straits and in that respect it was the original source of Article 35 (c).

735. In submitting the joint amendment, the representative of Denmark pointed out, that his delegation failed to see the need to change the rules of innocent passage through straits less than 6 miles wide, where the right of free passage and overflight had never existed. The problem could be solved, in the opinion of the Danish delegate "by maintaining the existing rules of innocent passage through international straits of less than 6 miles and establishing a new régime of "transit passage" through new wide straits, which would emerge as a result of establishing a maximum of 12 miles for the territorial sea". (*UNCLOS III, Official Records*, Volume II, Second Committee, 11th meeting, p. 124, Annex 80).

736. A similar view was expressed by the representative of Finland, who noted "that none of the texts submitted so far made an express exception for circumstances where the breadth of the territorial sea in a strait connecting two parts of the high seas would remain unchanged, in spite of the new provisions, and where the prerequisites for transit passage would thus also remain unchanged. Such was the case especially with regard to straits within or leading to enclosed sea areas, and being either completely within the territory of a coastal State, or passing through the territorial seas of States which already bordered on each other. If no special rules had been agreed upon, the provisions concerning innocent passage were applicable and could be applied also in the future. The situation had not changed and, therefore, there was no reason to require the

opening of such a strait to free passage .... Neither fishing nor other peaceful uses of the high seas required the proposed change in the *status quo* of straits traditionally used for international navigation based on the rules of innocent passage ....", (*UNCLOS III, Official Records*, Volume II, Second Committee, 11th meeting, pp. 124 - 125, Annex 81).

737. The joint amendment also demonstrates that in 1974, one year after the adoption of the 1973 Act on the Construction of a Bridge across the Great Belt providing for a high-level bridge spanning the Eastern Channel, Finland was perfectly satisfied with the *status quo* and the existing régime applied in the Danish straits and did not feel the necessity of extending to them the more liberal régime of transit passage.

738. In the light of the history of Article 35 (c), to invoke now Part III of the 1982 Convention, as Finland has done, is an admission that the two applicable instruments, the 1857 Treaty and the 1958 Geneva Convention, are not sufficient to support the absolute right of passage claimed by Finland. The explanation of Finland's making this argument is that Finland realizes that only the broader and more liberal transit passage régime of Part III would give legal support to the absolute, unlimited, and elastic right it is claiming before the Court. And even in taking that view, Finland may well be mistaken.

739. Nevertheless, Finland, in the Memorial paragraph 398 observes that Article 35 (c) is not in force yet. But Part III is not in force either, and they are interrelated provisions; if Part III has repercussions for this case, the express exclusion in Article 35 (c) must also have repercussions on the applicable law.

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740. Around the conventional right of passage for merchant ships established by the 1857 Treaty, the legal régime of the Danish straits has been completed by norms of customary law, codified in

the 1958 Convention, such as the concept of innocent passage, and also by norms of an exclusive customary nature, such as those concerning the passage of warships. Account must be taken also of the practice, now well established, which allows coastal States to prescribe sea lanes for ships of special characteristics and traffic separation schemes in order to ensure the safety of the navigation. This practice has been codified by Article 22 in Part II of the 1982 Convention on the Law of the Sea.

741. Yet, Finland contends that the provisions of the Treaty of 1857 have now become rules of customary law (para. 392 of the Memorial) and on this ground it denies the applicability of Article 36 of the Vienna Convention on the Law of Treaties concerning stipulations in favour of third States.

742. It is true that, as indicated in the Memorial, paragraph 711, there have been customary law accretions to the legal régime of the Danish straits, but these accretions have not displaced the provisions of the 1857 Treaty; the legal régime as a whole has been built upon the core of legal norms having a conventional and not a customary origin. If any doubt remains, it is dissipated by Article 35 (c) of the 1982 Law of the Sea Convention, initiated by a joint amendment submitted by Denmark and Finland. This Article recognizes conclusively that the legal régime of the Danish straits is *"regulated in whole or in part by longstanding international conventions in force specifically relating to such straits."* It follows that the Danish submission developed above (paras. 683 - 694) concerning the applicability of Article 36 of the Vienna Convention on the Law of Treaties continues to be valid.

4. HAS NEW CUSTOMARY INTERNATIONAL LAW DEVELOPED?

743. Having established that no general or specific rule of conventional international law prohibits Denmark in the exercise of its sovereign rights from constructing a fixed link across the Great Belt which allows for innocent passage for ships of all nations navigating those straits at a given time in the past, the question may

nevertheless be raised, as indeed Finland has done in paragraphs 377 and 401 of the Memorial, whether a rule of customary international law has come into being attributing a legal right of MODUs to be towed through the Danish straits. In the view of the Government of Denmark such a rule cannot be said to have materialized.

744. In particular, it should be stressed that the régime of transit passage regulated in Part III of the 1982 Convention cannot be applicable in the present case as emerging customary law, substituting the régime of the 1958 Convention.

745. Such a substitution can only take place in accordance with Article 311, paragraph 1 of the 1982 Convention which provides that "(t)his Convention shall prevail, *as between States Parties*, over the Geneva Conventions on the Law of the Sea of 29 April 1958" (Italics added). But neither Denmark nor Finland is a Party to the 1982 Convention.

746. Furthermore, the insertion of Article 35 (c), supported and proposed by Denmark and Finland, (paras. 731 - 739), demonstrates the *opinio juris* of the Conference, in exempting the Danish and the Finnish straits and other historic straits from the legal régime in Part III of the 1982 Convention. This result rules out completely the possibility of the emergence of Part III as customary law, in respect of the excluded straits.

747. It is correct, as stated in the Memorial, *inter alia* in paragraphs 427 and 508, that some MODUs have been passing without permission or hindrance through the Danish straits during the past years.

748. The number of such cases has been very limited, so limited that it cannot possibly form the basis for claiming that a legal norm is established through such limited practice obliging Denmark to permit forever an unlimited right of passage for such structures whatever their height or size. Moreover, the factual

conditions are different. In the absence of a bridge there was no reason for Denmark to object to the passage of the MODUs. But this did not mean that Denmark conceded that they used the strait *as of right*, and even less did it mean that, under quite different factual conditions - i.e., the existence of a bridge - Finland would have the right to demand that they still use the strait, as of right and without any restriction.

749. Thus the material element of custom necessary to prove the emergence of a right of passage for these structures through the Danish straits based on practice is entirely insufficient.

750. It is by mere tolerance from the Danish side that such structures have occasionally traversed the Great Belt through the past years and not because Denmark had the *opinio juris* that there was a duty to allow their unimpeded passage. There was at the time simply no actual interest or immediate risk of danger which would make it necessary for Denmark not to allow the MODUs in question to pass through the Danish straits. The fact that Denmark in 1973 adopted a law providing for a bridge with a 62 metres clearance also makes it abundantly clear that there was no *opinio juris* to require Denmark to tolerate the passage through the Danish straits of floating structures exceeding that height.

751. In the *North Sea Continental Shelf* cases, 1969, the Court pronounced itself in paragraphs 71 - 78 on the difficulties of demonstrating the existence of a customary rule based on State practice, stating *inter alia* that "... this result is not lightly to be regarded as having been attained." (*I.C.J. Reports 1969*, p. 41, para. 71). This *dictum* related to the rejection of an argument forwarded by Denmark and the Netherlands to the effect that a rule of customary law had come into being on the basis of a State practice consisting of some 15 cases of delimitation of the continental shelf on the basis of the equidistance principle.

752. In the same connection the Court made the following observations concerning the difficulty of demonstrating the existence of an *opinio juris sive necessitatis:*

> "The essential point in this connection - and it seems necessary to stress it - is that even if these instances of action by non-parties to the Convention were much more numerous than they in fact are, they would not, even in the aggregate, suffice in themselves to constitute the *opinio juris*; - for, in order to achieve this result, two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty. (*I.C.J. Reports 1969*, p. 44, para. 77).

753. As to the material evidence for the existence of a customary right of passage for MODUs through the Great Belt, there are not sufficient grounds for such a conclusion. It is based on the passage of less than one Finnish MODU per year on average since 1974 and only one MODU since 1985. Chile reports the passage of one MODU per year on average through its straits (Annex 36 to the Memorial, p. 182). Turkey reports that no MODUs have transited the Turkish Straits during the past 20 years (Annex 36 to the Memorial, p. 188). Several other countries for which no statistics are available report height restrictions or consider MODUs craft *sui generis* or with limited manoeuvrability

or require advance notice for passage, see paragraphs 630 - 634 above. There is nothing in this material that would point to a generally accepted custom.

754. On the contrary, bridges with clearances similar to that of the East Bridge across the Great Belt have been built across other international straits e.g., in Turkey. No objections having been voiced by the rest of the international community against the construction of these bridges, the *opinio juris* among States is likely to be that contemporary international law on the subject supports the conduct of Turkey and Denmark and thus accepts the right of States in the exercise of their national sovereignty to build bridges across their territorial sea in international straits as long as existing shipping traffic at the time of the construction is not hampered.

755. This legal position is further confirmed by the fact that during the Third United Nations Law of the Sea Conference an attempt was made at the early stage of the Conference to have inserted into the future text the following provision: "The coastal State shall not place in the straits any installations which could interfere with or hinder the transit of ships". The proposal was contained in Doc. A/CONF.62/C.2/L.11 of 17 July 1974, Art. 1, 2 (f) sponsored by Bulgaria, Czechoslovakia, German Democratic Republic, Poland, Ukrainian Soviet Socialist Republic and Union of Soviet Socialist Republics.

756. The Danish representative stated his opposition to this proposal in an intervention in the 11th meeting of the Second Committee of the Conference on 22 July 1974, see the Summary Records of the meeting, Volume II, page 124, paragraph 12, which reads as follows:

> "With reference to document A/CONF.62/C.2/L.11, which stated in article 1, paragraph 2 (f) that the "coastal State shall not place in the straits any installations which could interfere with or hinder the transit of ships", he pointed out that Denmark had geographically the character of an island

country, the main island being separated from the other main parts of the country, as well as from neighbouring Sweden, by narrow international straits. It was of vital social and economic importance for Denmark and its neighbouring countries to be able to build bridges or tunnels across those straits, and the Danish Parliament had already taken a decision in principle to that effect. Existing plans took full account of the obligation not to hamper the free passage of ships in transit. His delegation took it that the reference in article 1, paragraph 2 (f) to the placement of installations in straits did not modify the right of coastal States to build traffic links of the nature referred to, on the understanding that transit through the straits would be able to continue unhampered."

757. The views expressed were in no way opposed by the Finnish delegation to the Conference or by any other delegation, and the proposal failed to gain the support of the Conference.

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758. This survey of conventional and customary international law governing the aspect of passage through the Danish straits, including the Great Belt, shows that no general or specific rule of international law exists which would prohibit Denmark from constructing the planned high-level bridge across the Eastern Channel of the Great Belt in the exercise of its national sovereignty.

759. This result is supported by the following further considerations of law concerning the principles of good faith and equity.

B. Equitable Principles

1. THE PRINCIPLE OF GOOD FAITH

760. Good faith is a basic concept of law closely related to the conduct of the parties. The concept figures prominently in the Vienna Convention on the Law of Treaties (1969) where it forms part of the most fundamental principle of any legal order: *Pacta sunt servanda*. In the words of Article 26 of the Convention: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith". Likewise, a treaty shall be interpreted in good faith, see Article 31(1) of the Convention.

761. The concept of good faith implies that a State must act in a manner that takes into account the reasonable expectations and needs of other States in the international community. A State must be able to rely upon the conduct of other States and to expect that its own declarations are taken seriously and given legal effect according to their contents.

762. In the *Nuclear Tests* cases the Court gave added emphasis to the principle of good faith in interstate relations in particular as far as unilateral declarations are concerned. The Court stated the following:

> "One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential. Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the

obligation thus created be respected." (*I.C.J. Reports 1974*, p. 268, para. 46 and p. 473, para. 49.)

763. The notifications from the Danish Ministry of Foreign Affairs concerning the Great Belt Project sent to the Heads of all Diplomatic Missions accredited to Denmark in 1977, 1987 and 1989 - *in particular the Circular Note of 12 May 1977* - are indeed unilateral declarations of which States must take cognizance and in which they may place confidence. Likewise, the Government of Denmark has been fully entitled to trust that these notifications would receive serious attention by the States concerned, and that Denmark could safely rely on the reactions of other States to the notifications when continuing to carry out the Great Belt Project.

764. The Government of Denmark wishes to underline how succeeding Danish Governments have been acting in good faith in regard to Denmark's plans for the construction of a permanent link between the two main parts of the Realm divided by the Great Belt. Finland cannot claim to have acted in the same spirit.

765. As stated in Chapter II of Part II, great care was taken by succeeding Danish Governments to investigate the problems arising under international law in connection with the bridge project and to assess the international legal obligations incumbent on Denmark in this respect.

766. The conclusions reached were given maximum publicity by publication of the Reports from the Commission on a Great Belt Bridge (Report 237/1960 and 508/1968) and the enactment of specific legislation in this respect in 1961, 1973, and 1987. Furthermore specific notifications concerning the Great Belt Project were sent to the Heads of all Diplomatic Missions accredited to Denmark in 1977, 1987 and 1989.

767. In the course of this process, which has been described in detail above in Chapter II of Part I, no objections to the Project were made by foreign States until Finland in June 1990 notified the

Danish Government of its demand for a free passage through the Great Belt for Finnish MODUs. In particular, it should be stressed that for twelve years (1977 - 1989), Denmark had no sign from Finland that it could not accept a high-level bridge with a vertical clearance of 62 metres as notified in 1977. On the contrary, as late as in the spring of 1989 the President of Finland, could tell the Danish Ambassador that no bilateral problems existed between the two countries (para. 514). This statement came at a time when the execution of the entire Great Belt Project had been in progress for almost 2 years. The Danish Government had therefore no reason to believe that the Project would not be acceptable to the international community at large, including the Baltic States which have a particular interest in the passage through the Danish straits to the North Sea. Consequently, the Government of Denmark proceeded in good faith to carry out the Project, which is an integrated whole, engaging in very considerable economic investments as described earlier in paragraphs 114 - 120 and 138 - 140.

768. Finland obviously has an interest in the conditions of passage through the Danish straits. Finland has also had every opportunity through its Embassy in Copenhagen and through numerous formal and informal contacts between the Nordic Governments throughout the year to be fully aware of the precise development in the plans and the actual stage of the construction works for the building of a bridge across the Great Belt. Denmark, therefore, for its part has had every reason to rely upon this conduct of Finland as an acceptance of the bridge project as planned i.e., as a fixed construction with vertical clearance of around 65 metres allowing for all existing ships using the Great Belt to pass under the bridge, whereas no opening part of the bridge in the form of, for instance, a swing-bridge has ever been foreseen.

769. In this context it should be recalled that the plan to construct a *high-level bridge* across the Eastern Channel of the Great Belt originated in the Commission Report of 1960 and has never since been abandoned. The plan was made into law in 1973, and the preparatory work was initiated the same year. In 1977, the

time was ripe to announce the exact terms for the construction of the high-level bridge across the Eastern Channel of the Great Belt. This was done on *12 May 1977* by a Circular Note to all Heads of Mission accredited to Denmark. Though Denmark of course considered the bridge project as such to be legal under international law - otherwise the Act of 1973 would be in violation of international law, a point of view which has never been expressed by any foreign State - it could be that the vertical clearance of 62 metres as proposed would not meet the navigational needs of all States. Denmark might not have been aware of the existence of certain specific ships. Accordingly, the 1977 Circular Note - the first of its kind in international relations - was designed to act as an assurance to Denmark that the vertical clearance of 62 metres would meet with no objection from foreign States. It was thus a crucial, written communication by Denmark to the international community - following upon the announcement of the Project during the early days of UNCLOS III in 1974 (para. 756). As stated in the Note, the actual construction of the bridge was scheduled to begin in 1978 or 1979 and to go on for about eight years, and when construction had been completed the traffic separation scheme for the area would be adjusted. The announcement of the height of the bridge (62 metres) and the information about the time when actual construction would start (1978 or 1979) could leave no Government in doubt about the seriousness and actuality of the Project.

770. Within a year, the Note had been answered by several States with only one State, the then Soviet Union, asking the minimum height of the bridge to be set at 65 metres. Denmark was ready to carry out the Project - when a change of Government took place in the summer of 1978 with the formation of a Government consisting of the Social Democratic Party and its long time opponent the Liberal Party. This led to a postponement of the whole Great Belt project for a period of approximately 4 - 5 years. That political development came as a surprise to everybody and was certainly not to be foreseen in 1977 and the first half of 1978.

771. Against this background, which is well-known to Finland, it is remarkable to read the Finnish account in paragraph 542 of the Memorial which finishes: "...In all the circumstances and in the light of the long history of abortive plans to construct a bridge over the Great Belt, it is hardly surprising that Finland should not have reacted immediately to the Danish Circular Note of 12 May, 1977. ...". It is indeed surprising that Finland should not have reacted if the high-level Bridge across the Eastern Channel created serious problems for Finnish ships, as it is now claimed. The truth is, of course, that the bridge project did not cause such problems as has been demonstrated in Chapter IV of Part I. As far as the Finnish MODUs are concerned, which at that time had occasionally passed through the Danish straits, the lack of any Finnish reaction also in that respect points decisively towards an attitude on the part of Finland similar to the view of Denmark and other States according to which MODUs could not qualify as ships having a *right* under contemporary international law to innocent passage through the Danish straits.

772. Finland asserts that the announced vertical clearance of 62 metres did not give rise to any major concern because existing ships were assured of being able to navigate the Great Belt "as in the past", meaning that Finnish drill ships, semi-submersibles and jack-ups which had already passed through the Great Belt would be able to continue to do so (para. 543 of the Memorial). That assertion violates the very logic of announcing the height of the bridge, in so far as no bridge could be built with a height of 100 metres and more. Already in the 1973 Act it is stated in Section 2 that the design of the high-level bridge shall allow for the necessary navigational clearance i.e., the width and the height of the bridge. It is indeed these two "clearances" which have always been at the centre of the international legal considerations in constructing bridges across waterways with a heavy traffic of ships. To assume that the words "as in the past" contains the possibility of inserting an opening in the bridge would amount to nothing but wishful thinking as no evidence exists in the long history of planning the Fixed Link across the Great Belt to support such an assumption. An

opening had never been contemplated as evidenced by Figure 1 and would run counter to the whole scheme for a high-level bridge.

773. Finland further explains why the Government of Finland did not respond to the 1977 Note (para. 544 of the Memorial). The express and simple announcement given by the Danish Minister for Public Works in the Danish Parliament on 17 October 1978 (one-and-a-half year after the diplomatic notification) in which the Minister stressed that the Great Belt Project was merely postponed, is construed by Finland in the following way:

> "...However one interprets the terms in which the project was finally suspended in 1978, there is no doubt that it was put "into the refrigerator" for an indefinite period, even if it was expected or anticipated on the Danish side that work on it might be resumed within a measurable period. Accordingly, as from 30 August, 1978, at the latest, the then Great Belt project, to which reference was made in the Danish Circular Note of 12 May, 1977, was effectively suspended for an undefined period. It follows that any immediate threat to Finnish rights and interests was (at least temporarily) removed as from the summer of 1978, so that no reaction from Finland to the Danish Circular Note of 12 May, 1977, was or could have been called for as from the date of the announcement of the suspension. ...".

774. This represents a clear example of interpretation through hindsight and contrary to the facts as they existed at the time as explained in detail in Chapter II of Part I. On the other hand, it reveals a close interest in Danish politics, especially as regards the Great Belt Project. The more surprising is it then to read in paragraphs 553 - 554 of the Memorial that Finland had no idea that the tunnel alternative had been abandoned in the fall of 1988, and that it was not until receipt of the third Danish Circular Note of 24 October 1989 that Finland and other States were informed of the high-level bridge of 65 metres. These assertions are in direct contrast to the fact that Finland, for the first time, reacted to the

Bridge Project in July 1989 i.e., *before* the Circular Note of October 1989. That Finland did not consider the 1989 Circular Note as the crucial communication can be seen from the wording of the Finnish reaction. Thus, the letter of *18 July 1989* addressed to the Danish Maritime Authority asks for possible alternative routes for Finnish drilling platforms with a full height of 150 metres (Annex 60). This approach from Finland could not be understood by Denmark to represent a request for adjusting the height of the bridge because no bridge could be built with a vertical clearance of 150 metres. According to the letter, *the Finnish industry had followed the planning of a fixed bridge across the Great Belt*, so it was only natural to read the letter as a request from Finland about how best to adapt to the fixed bridge. In the Danish reply of 29 August 1989 (Annex 61) reference is made to the Sound as an alternative route for offshore craft, as well as to the possibility of modifying these high structures for transportation.

775. Finally, Finland explains its passivity regarding the Danish notifications in 1977 and 1987 by suggesting that the *decision* to build the Bridge was not taken until 1988 (para. 554 of the Memorial). However, the decision to build the bridge was taken in 1973 (Act No. 414 of 13 June 1973) and specific notification of the height of the bridge was issued in 1977. The Circular Note of 12 May 1977 is the decisive communication. That this is so, is shown by the fact that States did react to the 1977 Note realizing that now was the time to express any views concerning the proposed design of the bridge. The 1977 Note offered a clear and detailed basis on which to react. That the year 1977 was seen by the international community as the relevant time for considering the matter is moreover borne out by the fact that no State reacted to the Circular Notes of 1987 and 1989 - except for Finland's objection conveyed to the Government of Denmark in June 1990, more than twelve years after the *principal* question of the bridge project was settled.

776. What remained to be decided in 1989 was the exact height of the bridge. That question had to be settled at a time when

there was clarity on the design of the bridge, but before the projected work had so far progressed as to render alterations that might prove desirable, no longer possible. In the view of the Government of Denmark, that point in time had been reached already in May 1977 and, having received the comments from the States concerned, Denmark was ready in the summer of 1978 to send out notice for tender - a step which *par hazard* was never taken.

777. When the 1973 Act was reactivated in 1987 through a new act, the Government of Denmark believed itself to be assured that the bridge project would not meet with any objections from foreign States, as long as the vertical clearance would be set around 65 metres. Nevertheless, Circular Notes of 30 June 1987 and 24 October 1989 were sent to all Heads of Mission Accredited to Denmark in order that they be kept informed about the progress of work.

778. Based on the 1987 Act notice for tender by restricted procedure for the East Bridge was given on 15 July 1989. At that point in time the Government of Denmark, through the Report from *Det Norske Veritas*, as well as through the reactions received up to that time from foreign States had satisfied itself, that a vertical clearance of 65 metres would meet the requirements of existing traffic of ships through the Great Belt. Up to the date of 15 July 1989 Denmark had thus used its best endeavours as a strait State to accommodate the need for passage through the Great Belt for ships of all nations.

779. In the interest of promoting stability in international relations based on the general concepts of good faith and equity, international law must require *protest* or some other form of action on the part of States in order to preserve their legal positions, in cases where they believe that their legal rights may be infringed by acts performed or contemplated by another State, and where the possibility of expressing such a protest in fact existed - see the *dictum* in the *Lotus* case concerning the lack of protest in

circumstances where according to international practice it would be a normal procedure to react if a State believed that a violation of international law had taken place (*P.C.I.J. 1927 Series A, No. 10*, p. 29).

780. The duty for a State to protest, or to proceed to some other form of action, in order to protect a legal right arises at the time when the State by notification or otherwise has come into possession of knowledge of such acts performed or contemplated by another State which are presumed to infringe upon its own legal rights.

781. The importance of the duty to protest or take other similar action, and to do so within a reasonable time, is increasingly dependent upon the relationship between the interests at stake for either side[87]. Where a State is likely to proceed, in the absence of protest, with a course of conduct involving great cost, and vital national interests, another Party is expected to protest promptly if its interests are likely to be adversely affected and are of comparable importance. The political history of the Danish straits as well as the Turkish and the Japanese Straits - as described in the treatise on International Straits by Dr. Erik Brüel - is clear evidence of this fact. The States concerned have always been ready to lodge a protest immediately with the strait State, whenever prospects of a closure of the strait were present[88]. If, on the other hand, the passage in principle has been kept free, the States concerned have acquiesced in even detailed regulations of the traffic, including

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[87] In Article 13 of the "Draft articles on the law of the non-navigational uses of international watercourses" (*Report of the International Law Commission, 43th Session* (46 - Suppl. No. 10)) the period of reply to an obligatory notification from a watercourse State of planned measures which may have an appreciable adverse effect upon other watercourse States, is fixed to six months only. According to Article 16 of the Draft the notifying State may proceed with the implementation of the planned measures, if it receives no communication from a notified State to the effect that the planned measures are inconsistent with the pertinent rules on utilization of international watercourses.

[88] See Erik Brüel, *International Straits*, pp 101-108, Vol. I.

fixed bridges, such as the Bosphorus bridges, as long as the existing regular traffic of ships has not been excluded.

782. In the present case there can be no doubt that, since the adoption of the 1973 Act on the Construction of a Bridge across the Great Belt, States have been fully aware of the paramount importance of that project, including the high-level bridge across the Eastern Channel, to the Danish society and of the importance for the Government of Denmark to be informed well in advance of the execution of the Project of any reactions on the part of other States. The huge dimension of the Project as well as its integrated character makes it a duty for States concerned to react - if necessary - without undue delay. There has been ample time to react.

783. Thus, timely protest is an essential element in the administration of international straits. Consequently, the fact that no State protested against the Danish Bridge Project within a reasonable time, just as no State has ever protested against the existence of the Bosphorus bridges, could not be interpreted by the Government of Denmark otherwise than as an acquiescence in the construction of the bridge.

784. The lack of protest by the international community to the Great Belt Bridge Project goes as far back as the beginning of UNCLOS III where a proposal which would prohibit States from placing in Straits any installations which would interfere with or hinder the transit of ships was defeated (paras. 755 - 757). The Danish opposition to this proposal was presented to the Conference in an intervention on 22 July 1974 in which it was stated *inter alia* that it was of vital social and economic importance for Denmark and its neighbouring countries to be able to build bridges or tunnels across the Danish straits, and that the Danish Parliament had already taken a decision in principle to that effect. The intervention met with no objection from any State.

785. The line of reasoning developed above concerning the principle of good faith does not necessarily mean that all other States favour the implementation of the Bridge Project, but it must mean that all States, with the exception of Finland, have accepted that priority in law be given to the building of the high-level bridge in the exercise of national sovereignty and out of concern for the further development of the Danish society and the well-being of its population.

2. THE PRINCIPLE OF EQUITY

786. The present case demonstrates, in the view of the Government of Denmark, a conflict between two interests governed by two sets of legal rights. First and foremost, there are the sovereign rights of a coastal State over its territorial sea, including international straits. Second, there is the general right of innocent passage through the territorial sea, appertaining to ships of all Nations, with the particular safeguards attaching to that right of passage in an international strait. The balancing of these two sets of rights, which are lacking in precision, must in any given case be subject to a legal evaluation taking into account the principle of equity recognised by international law as an expression of justice and the rule of law.

787. In its Memorial (para. 420) Finland quotes a passage from Dr. Erik Brüel to the effect that Denmark cannot actively deprive the straits of their character as navigable waterways. The quotation is used in support of the following contention contained in the same paragraph:

> "While there can be no doubt that territorial sovereignty over the land whose coasts border the strait and over the waters of the strait includes the right to build a fixed link between the coasts separated by the strait, there can be no doubt either that such a right cannot be exercised in such a

> way as to deprive that strait - in whole or in part - of its character as a navigable waterway. ...".

788. The interesting aspect of that proposition is Finland's recognition of the fact that Danish sovereignty provides the basis for constructing a bridge across the Great Belt as long as that construction does not deprive the strait of its navigable character. As it appears from Dr. Erik Bruel's treatise on international straits, the Danish policy towards its straits since the conclusion of the 1857 Treaty can be characterized as liberal (compared to the policy of other strait states) and far from *depriving* the Great Belt of its character as a navigable waterway the Kingdom of Denmark has endeavoured to improve the conditions for the passage of ships through the Great Belt, taking into account the changing development, in size and character, of that traffic. In particular, reference is made to the establishment in 1975 of the so-called Route T through the Great Belt (paras. 568 - 569), which has been further improved since 1975 in order to improve the safety of navigation in accordance with experience gained. The construction of the bridges and the tunnel across the Great Belt are also to be seen as an essential improvement in the safety of navigation in the Belt in so far as the *daily* transport of some 28,000 persons and 11,000 tonnes of goods carried by approximately 150 ferry crossings will from now on be separated from the north-south bound traffic of ships. The alternative, a further intensification of the ferryboat service, would make the Belt more and more complicated and dangerous to navigate.

789. Finland treats the Danish straits as waterways through which any form of passage may take place up to their natural limits. Thus, in the Memorial (para. 241) it is stated that

> "... it can now be concluded that with a future increase of ship draught into the maximum allowable Baltic draught (15 m), ships might have an air draught of about 99 m and in any case much in excess of 65 m. ..."

and in paragraph 227 it is said:

> "The possibility cannot be excluded that the consequent increases in tanker height, together with an already used transportation method (i.e. "lightening" a VLCC into Baltic draught) becomes critical if the Great Belt bridge will have a clearance of 65 metres."

790. However, neither can it be excluded that the passage of such ships or floating objects does not meet the requirement of "innocent passage" taking into account the increasing traffic in the Great Belt, in particular the east-west bound traffic, if the fixed traffic link were not established. A glance at the map of Denmark shows how narrow the Danish straits are and how vulnerable the surrounding land territory is to accidental pollution and collision disasters. The Danish straits cannot be subject to unrestricted exploitation. The well-being of the people living in the vicinity of the straits must be given due and primary consideration. In this respect the bridge solution for the Fixed Link across the Great Belt strikes an almost perfect balance between the interests of the international community, the national Danish interests, and the future safety of navigation through that strait corresponding to a norm of equity.

791. While the high-level East Bridge across the Great Belt respects the existing traffic of ships navigating that strait it is equally clear that the bridge does not and cannot respect any piece of cargo being towed or transported through the Great Belt. The rule of equity is there to adjust the obvious imbalance between the construction of the high-level bridge in the exercise of national sovereignty and the occasional transport of an outsized piece of cargo carried on a heavy-lift ship claimed to be part of the right of innocent passage. If such transports were to be respected it would spell the end of the construction of high-level bridges across waterways governed by international rules securing innocent passage or freedom of navigation through those waterways. It is impossible to plan a bridge if future cargo - like future ships - had

to be taken into account. The principle of equity redresses such a situation and secures an equitable result.

792. In order to reach an equitable result, one cannot escape a *proportionality* test of the factual circumstances of the present case. In this respect, it immediately leaps to the eye that the Fixed Link across the Great Belt will in 1997 secure an estimated *daily* transportation of some 60,000 persons and 25,000 tonnes of goods crossing the Belt and leave untouched the regular traffic of some 20,000 ships *yearly* through the Belt. Against these figures stands the passage until today of less than one Finnish offshore drilling unit a year and no actual plans for any passage in the coming years.

793. The demand by Finland for inserting an opening in the bridge - which is not feasible in particular because of the high risks involved - would in terms of costs be out of all proportion to the costs involved in completing the last section of the derrick of an offshore craft after passing under the bridge, an operation which carries no risk. Moreover, the Sound is a perfectly viable route for the passage of the Finnish MODUs.

794. In sum, the importance of the Great Belt Project to the traffic of the region completely outweighs the importance of the possible passage of a few Finnish offshore craft.

795. To advance this point of view in the discussion of the legal rules governing the present dispute is but to recognize the importance of the Court's *dictum* in its Advisory Opinion of 20 December 1980 concerning Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt where it says:

> "...But a rule of international law, whether customary or conventional, does not operate in a vacuum; it operates in relation to facts and in the context of a wider framework of legal rules of which it forms only a part. Accordingly, if a question put in the hypothetical way in which it is posed in the request is to receive a pertinent and effectual reply, the

> Court must first ascertain the meaning and full implications of the questions in the light of the actual framework of fact and law in which it falls for consideration. ..." (*I.C.J. Reports 1980*, p. 76, para. 10).

*

796. The Government of Denmark submits that the factual circumstances of the present case evaluated against the principles of good faith and equity support the conclusion that the construction of the high-level East Bridge across the Great Belt does not violate international law.

C. Summary of Legal Arguments

797. The Danish legal arguments may be summarized in the following way:

> (1) The fact that the Danish straits form part of Denmark's territorial sea and have done so throughout the history of the Kingdom of Denmark makes it a right of Denmark in the exercise of its national sovereignty to regulate the passage through the straits and to construct a fixed link of vital interest to the development of the Danish society, as long as such measures do not unduly interfere with the international community's right of innocent passage through the straits.
>
> The construction of the high-level bridge across the Eastern Channel of the Great Belt with a main span of 1,624 metres and a vertical clearance of 65 metres does not interfere with the existing traffic of ships through that strait - on the contrary, the existence of the bridge will enhance the safety of navigation through the Belt by removing the steadily increasing cross ferry traffic.

(2) Floating offshore units such as jack-ups and semi-submersibles do not come within an internationally recognized concept of ships and are, therefore, not entitled, as a matter of legal right, to unimpeded passage through the Danish straits.

Furthermore, it is an established fact that these so-called MODUs have never navigated the Danish straits, like ships do, but have been towed through or transported on heavy-lift ships.

Even if these MODUs were to be considered ships Denmark is entitled, to exercise the option granted by Article 1, Section 1 of the Copenhagen Treaty of 1857, and decide to establish a traffic separation scheme according to which the drilling platforms shall exercise their right of passage through the Sound and not through the Great Belt. Furthermore the right of the coastal State to direct ships with special characteristics to use such sea lanes and traffic separation schemes as it may designate is an established customary rule codified in Article 22 of the Law of the Sea Convention of 1982.

(3) Finland has acknowledged not being a Party to the 1857 Treaty but a third party beneficiary. It follows that it cannot exercise its rights in a more extensive manner than the actual Parties, which have accepted a 65-metre clearance. Article 36, paragraph 2 of the Vienna Convention on the Law of Treaties provides that third party beneficiaries must exercise their rights in accordance with the conditions established by the Parties in conformity with the treaty.

(4) The notion of objective régimes established by treaties is an obsolete concept, rejected by contemporary international law. The legal position concerning treaties establishing a right of passage over maritime waterways is that they

constitute treaty stipulations in favour of all States, based on Article 36 of the Vienna Convention.

(5) The legal situation which has developed from the Copenhagen Treaty of 1857 is not changed by the legal régime codified in the 1958 Geneva Convention with regard to territorial waters and international straits. The principle of innocent passage is firmly established, and so also is the competence of the territorial State to administer the right of passage.

(6) The 1982 United Nations Convention on the Law of the Sea exempts expressly international straits like the Danish straits from that part of the Convention which deals with straits used for international navigation. Thus, the right of transit passage established by the 1982 Convention as a result of the fixing of the territorial sea at a maximum of 12 nautical miles does not apply to the Danish straits, which are less than 6 miles wide.

(7) No rule of customary international law has developed to allow drilling platforms an unimpeded right of passage through the Danish straits.

(8) Equitable principles such as the principle of good faith and the principle of equity support the conclusion that Denmark has not acted against international law in planning, deciding and now constructing the Fixed Link across the Great Belt. Acting within its national competence, Denmark has notified the international community several times about the Project to build *inter alia* a high-level bridge across the Great Belt. No objection has been presented to the successive Danish Governments in charge of the Project - until the

much belated Finnish diplomatic reaction on 19 June 1990, more than twelve years after the first and crucial notification was issued on 12 May 1977. Denmark has been entitled to rely on the silence of Finland in exercising its sovereign right to construct the Fixed Link across the Great Belt.

PART III

SUBMISSIONS

798. In the light of the facts and the law set forth above,

May it please the Court to adjudge and declare

(1) that the rules of international law applicable to the Danish straits do not prevent the Kingdom of Denmark from constructing the Fixed Link across the Great Belt as planned and decided, and

(2) that the Submissions by Finland cannot be sustained, and consequently should be rejected.

Copenhagen, 18 May 1992

TYGE LEHMANN PER MAGID PER FERGO

Agents of the Government of the Kingdom of Denmark

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Annex 53. Report of the Sub-Committee on Safety of Navigation on its 35th Session, 2 February 1989 (Navigational Aspects of a Bridge over the Strait of Messina).

Annex 54. Report of the Maritime Safety Committee on its 57th Session, 2 May 1989 (Navigational Aspects of a Bridge in the Strait of Messina).

Annex 55. Report on Proposals for a Fixed Channel Link Presented to Parliament by the UK Minister of Transport, September 1963.

Annex 56. Invitation to promoters for the development, financing, construction and operation of a Channel Fixed Link between France and the United Kingdom, April 1985.

Annex 57. Statement of 20 January 1986 by the British Secretary of State for Transport to the House of Commons.

Annex 58. Proceedings from the 1991-1992 Session of the Second Chamber of the Houses of Parliament of the Netherlands on a Westerschelde Fixed Shore Connection.

Annex 59. Dispatch No. II from Ambassador P. Michaelsen (Denmark), 21 March 1989.

Annex 60. Letter from the Embassy of Finland to the Danish Maritime Authority, 18 July 1989.

Annex 61. Reply from the Danish Ministry of Foreign Affairs to the Embassy of Finland, 29 August 1989.

Annex 62. Letter from the Finnish State Secretary, Mr. Åke Wihtol, to the Danish Permanent Under-Secretary of State for Foreign Affairs, Mr. Otto Møller, 25 August 1989.

Annex 63. Note Verbale of 19 June 1990 from the Embassy of Finland to the Danish Ministry of Foreign Affairs.

Annex 64. Note Verbale of 11 July 1990 from the Danish Ministry of Foreign Affairs to the Embassy of Finland.

Annex 65. Note Verbale of 7 September 1990 from the Embassy of Finland to the Danish Ministry of Foreign Affairs.

Annex 66. Note Verbale of 2 October 1990 from the Danish Ministry of Foreign Affairs to the Embassy of Finland.

Annex 67. Note Verbale of 5 November 1990 from the Embassy of Finland to the Danish Ministry of Foreign Affairs.

Annex 68. Letter of 9 November 1990 from the Finnish Minister for Foreign Trade, Mr. Pertti Salolainen, to the Danish Minister of Industry, Ms Anne Birgitte Lundholt.

Annex 69. Letter of 6 February 1991 from the Prime Minister of Finland, Mr. Harri Holkeri, to the Prime Minister of Denmark, Mr. Poul Schlüter.

Annex 70. Letter of 20 February 1991 from the Prime Minister of Denmark, Mr. Poul Schlüter, to the Prime Minister of Finland, Mr. Harri Holkeri.

Annex 71. Comments of the Danish Government on Finland's proposals for establishing an opening in the East Bridge.

Annex 72. Ordinance No. 73 of 27 February 1976 Governing the Admission of Foreign Warships and Military Aircraft to Danish Territory in Time of Peace.

Annex 73. Opinion of 22 October 1962 by Professor Max Sørensen on the Impact of the Convention of 29 April 1958 on the Continental Shelf on the Construction of a Bridge across the Great Belt.

Annex 74. Article by Professor Sjur Brækhus on the Concept of Ship and Ship Equipment. Nationality of Ship. Measurement and Identification of Ship.

Annex 75. 1990-1991 Summary of Register Books and Statistical Publications issued by the Committee of Lloyd's Register of Shipping.

Annex 76. IMO Resolution A.550 (13) of 17 November 1983 on Apportionment of Expenses among Member States.

Annex 77. Statement by the Danish Commissioner at the Meeting of the Conference on the Redemption of the Sound Dues on 16 February 1857.

Annex 78. International Law Commission's Debate on the Draft Convention on the Law of Treaties, 4-5 and 8 June 1964.

Annex 79. United Nations Conference on the Law of Treaties, 35th Meeting of the Committee of the Whole, 23 April 1968.

Annex 80. Third United Nations Conference on the Law of the Sea, Second Committee, 11th Meeting, 22 July 1974, Statement by Mr. Fergo, Denmark.

Annex 81. Third United Nations Conference on the Law of the Sea, Second Committee, 11th Meeting, 22 July 1974, Statement by Mr. Manner, Finland.

CORRESPONDENCE

CORRESPONDANCE

1. THE REGISTRAR TO THE AGENT OF DENMARK[1]

23 June 1992.

I have the honour to inform you, in conformity with Article 54 of the Rules of Court, that the Court has fixed Monday 14 September 1992, at 10 a.m., for the opening of the oral proceedings in the case concerning *Passage through the Great Belt* (*Finland* v. *Denmark*). The Court, keeping in mind Article 60, paragraph 1, of its Rules, is of the view that the oral proceedings should not exceed a maximum of three weeks.

(*Signed*) Eduardo VALENCIA-OSPINA.

2. THE CO-AGENT OF FINLAND TO THE REGISTRAR

1 September 1992.

In accordance with Article 56 of the Rules of Court, I herewith enclose for submission to the Court in the case concerning *Passage through the Great Belt* the following documents:

(1) the original of a report on underkeel clearance for MODUs passing through the Sound, prepared by Noble Denton Marine Services;
(2) the Reply by the United States to the questionnaire appearing as Annex 36 to the Memorial of the Government of Finland in this case;
(3) the English translation of an extract from Communication No. 2/1975 of the Marine Surveying Department of the Swedish Board of Navigation regarding Norms for Navigation Routes and Relevant Safety Provisions within These;
(4) a telefax from the Finnish Ministry for Foreign Affairs of 24 July 1992 to Società per azioni con sede in Milano (SAIPEM) and SAIPEM's Reply of 18 August 1992.

I shall also enclose 25 additional copies of each of the above documents plus the Swedish language original of the document mentioned in point (3) above.

(*Signed*) Martti KOSKENNIEMI.

3. THE AGENT OF FINLAND TO THE REGISTRAR

3 September 1992.

As you are aware, negotiations have been conducted between Finland and Denmark, in accordance with paragraph 35 of the Court's Order of 29 July 1991[2] in the case concerning *Passage through the Great Belt* "with a view to achieving a direct and friendly settlement". I now have the pleasure to inform you that a settlement between Finland and Denmark has been attained as of today.

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[1] A letter in identical terms was sent to the Agent of Finland.

[2] *I.C.J. Reports 1991*, p. 12.

In accordance with the terms of that settlement, I have the honour, in accordance with Article 89 of the Rules of Court, to notify you of the discontinuance of the case by the Government of Finland and the withdrawal of the Application it filed in the Registry of the Court on 17 May 1991.

(Signed) Tom GRONBERG.

4. THE DEPUTY-REGISTRAR TO THE AGENT OF DENMARK

3 September 1992.

In accordance with Article 56 of the Rules of Court I have the honour to transmit to you herewith a copy of a letter dated 1 September 1992 which I have received, together with the documents therein mentioned, from the Co-Agent of Finland in the case concerning *Passage through the Great Belt*.

Copies of the documents are being dispatched to you under separate cover by courier.

In the light of Article 56 of the Rules of Court, and in view of present circumstances, I would be most obliged if you could submit any comments you may wish to make by telefax or telephone and not later than 6 p.m. on Wednesday 9 September.

(Signed) Bernard NOBLE.

5. THE AGENT OF DENMARK TO THE REGISTRAR

4 September 1992.

Referring to the letter dated 3 September 1992 from the Agent of the Government of Finland notifying the Court of the discontinuance of the case concerning *Passage through the Great Belt* by the Government of Finland I have the honour to state on behalf of the Danish Government that Denmark has no objection to the withdrawal of the case.

(Signed) Tyge LEHMANN.

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